POLICE ACADEMY
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IN SERVICE:10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

2 MONTH DELAY IN EXAMINING BLACKBERRY AFTER ARREST OK

R. v. Giles et al., 2007 BCSC 1147

Police arrested an accused in his vehicle for possession of cocaine for the purpose of trafficking, searched the vehicle incidental to arrest, and seized a BlackBerry from beside his driver's seat. Fifty days later the police submitted the BlackBerry to the Technological Crime Branch (TCB) in Ottawa for examination. They wanted it examined to see what was saved on it, such as score sheets, phone numbers, E-mail addresses, account numbers, etc. The primary examination of the device occurred two months after it was seized on arrest. This resulted in the recovery of 164 e-mails exchanged between the co-accuseds which were stored or "residing" on the BlackBerry's memory.

During a *voir dire* in British Columbia Supreme Court, the accused argued the police breached his s.8 *Charter* right when they searched the BlackBerry without a warrant. In his view, the common law power of searching incident to arrest did not apply to the warrantless extraction and examination of the contents of the BlackBerry because it was feasible for police to obtain prior judicial authorization by way of a search warrant. He submitted, in part, that the time and distance from the arrest to the search conducted by persons not involved with the arrest rendered it outside the scope of a search incident to arrest. Justice MacKenzie, however, ruled the examination of the BlackBerry some two months after its seizure was proper. He stated:

> The law is settled that a warrantless search of a vehicle may be a valid search incidental to arrest if it is conducted for a valid purpose, such as to discover evidence of the offence, and if there is subjectively some reason related to the arrest for conducting the search when it was carried out and the reason was objectively reasonable.
>
> I disagree with defence counsel that the police exceeded the scope of the common law power to search incidental to arrest when they searched the BlackBerry and retrieved its 164 e-mails. The seizure of the BlackBerry device itself was meaningless without the ability to examine its contents. Having lawfully arrested [the accused] for drug trafficking, the police were authorized to search him and his immediate surroundings, in this case his vehicle … and, since the justification for the search was to find evidence, the police could seize items on which there was some reasonable prospect of securing evidence of the offence for which the accused was being arrested.
>
> Here, [the accused] was lawfully arrested on grounds that he had just been involved in a very substantial cocaine transaction. The seizure, the examination of the contents of his BlackBerry, and the retrieval of the e-mails was truly incidental to arrest. According to the report of the TCB analysis team, the police were looking for evidence of "score sheets", telephone numbers, e-mail addresses, memos, calendar information, saved digital communications, PIN numbers, bank account numbers and passwords still residing within the device memory. The term "score sheets" refer to a form of accounting used to keep track of drug purchases, orders and accounts receivable. All these items, for which the investigators had directed the TCB to search, were clearly reasonably connected to the arrest for a serious drug offence. These are not items which have nothing to do with the offence of large scale drug trafficking.
>
> The search was akin to looking inside a logbook, diary, or notebook found in the same circumstances. The BlackBerry device was meaningless without its contents. There was a reasonable basis for doing what the analysts did at the request of the police. I also observe that most of the 164 e-mails the Crown seeks to tender (cont'd)

HIGHLIGHTS IN THIS ISSUE

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

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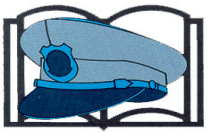
In evidence were from [the date of the arrest]. A few were from the day before.

Also, the analysis and search ... occurred within a reasonable time after the arrest in the circumstances. The police had to send the BlackBerry from Kelowna to the TCB in Ottawa for examination. Neither the two months between the arrest and analysis, nor the distance were unreasonable in the circumstances. For example, reasonable requirements of time and distance for the forensic analysis of blood on clothing seized in a search incident to arrest, for DNA information is routine. Once an item is seized for use in a criminal investigation, the police are entitled to subject it to technical analysis to determine its evidentiary significance. This often requires sending the item "off-site" to qualified experts. Neither the time nor the distance between the arrest and the analysis mean that the search of the BlackBerry fell outside the scope of the common law power to search incidental to this lawful arrest. [references omitted, paras. 54-57]

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

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



"Thanks for working to keep us current; I always get something useful out of every issue." - **Police Constable, British Columbia**

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"I have been using your news letter for the past two years to keep up to date with legal developments. I receive it from one of the other Sgt's and I then discuss the case laws at our platoon briefings....Thanks." - **Police Sergeant, New Brunswick**

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"I have just been introduced to your publication and found there is a wealth of information in it. I would be very pleased to be added to your online mailing list." - **Canada Border Services Officer**

****

"I read your recent Newsletter and found it interesting and informative. Could you please add me to your mailing list for future newsletters." **Conservation Supervisor, Department of Natural Resources, New Brunswick**

"Your publication is very informative. Keep up the great work." - **RCMP Constable, Nova Scotia**

****

"I was introduced to the 10-8 In service newsletter today for the first time. I read it through, especially the case law, and found it extremely informative and helpful." - **Police Detective, Ontario**

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"I am a regular reader of your newsletter and would like to be included on the mailing list for it. I find that it is a great resource for keeping up on current case law, which is important for this line of work." - **Police Detective, New Brunswick**

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"A recently-arrived former "E" Division member recommended your newsletter, which I just finished reading. Very impressive! Please add me to your e-mail list." - **RCMP Corporal, Ontario**

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"A colleague of mine gave me a copy of your newsletter and I was very impressed. ... thanks and keep up the great work." - **RCMP Constable, Saskatchewan**

****

"I was emailed a copy of the 10-8 newsletter from a co-worker, and would be most appreciative if you could add me to your email list. I found it to be incredibly interesting and informative. As an Auxiliary Constable with aspirations in furthering my career in law enforcement this is a wonderful learning tool." - **RCMP Auxiliary Constable, British Columbia**

****

"A colleague recently e-mailed me the Nov/Dec 07 issue of 10-8, and I found it quite informative; particularly in the realm of case law." - **Police Officer, Alberta**

****

"Outstanding job, as always. I learn something, usually more than one thing, every time I read your newsletter." - **Police Constable, British Columbia**

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Love the newsletter - great job on it." - **Police Officer, Ontario**

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 45 for the answers.

1. The police are allowed to persuade a detainee to break their right to silence by legitimate means.
   (a) True
   (b) False

2. A person cannot rebut the presumption of care or control found in s.258(1) of the *Criminal Code* by establishing, on a balance of probabilities, they did not have the intention to drive.
   (a) True
   (b) False

3. Failing to tell a person why they are being detained may result in a statement made by the person being inadmissible.
   (a) True
   (b) False

4. The phrase "finds committing", as it pertains to effecting a citizen's arrest, generally does not relate to situations where the person being arrested is discovered in the very act of committing an offence.
   (a) True
   (b) False

5. When seeking to admit evidence of a DNA sample voluntarily provided by a suspect, the Crown must prove waiver beyond a reasonable doubt.
   (a) True
   (b) False

6. A single incident of threatening conduct can found a conviction for criminal harassment.
   (a) True
   (b) False

7. Observations made by a police officer during traffic stop procedures can be used in court for both establishing reasonable grounds as well as evidence of impairment.
   (a) True
   (b) False

PROBATION INVALID WHEN CONSECUTIVE SENTENCES EXCEED 24 MONTHS

R. v. Yetman, 2008 NLCA 6

The accused pled guilty in Newfoundland Provincial Court to assault with a weapon and breach of recognizance. He was sentenced to 12 months in prison and placed on probation for three years following his release. Later that same day he pled guilty before a different Newfoundland Provincial Court judge to aggravated assault and was handed an 18 month sentence consecutive to the earlier 12 month sentence.

The Crown appealed the sentence to the Newfoundland Court of Appeal arguing the probation order became invalid. Chief Justice Wells agreed:

> Section 731 of the Criminal Code permits a probation order to be made where a court decides to suspend the passing of sentence, or to be made in addition to fining or sentencing to imprisonment for a term not exceeding two years. This Court has previously determined…that the combined effect of section 731 of the Criminal Code and subsection 139(1) of the Corrections and Conditional Releases Act…[i]n a circumstance where a second sentence is imposed, while an earlier sentence imposed upon the offender remains unexpired, the two are to be treated as one sentence which commenced on the date that the first sentence was imposed and ends on the date that the last sentence to be served would expire in the ordinary course". Where that unexpired "one sentence" exceeds two years, a probation order may not be imposed, and any probation order that may have been properly imposed, in respect of any prior sentence that is a component part of the "one sentence", becomes invalid. [references omitted, para. 2]

In this case, the deemed one sentence resulting from the combined sentences exceeded 24 months rendering the probation order, although valid when it was made, invalid. The probation order was set aside.

Complete case available at www.canlii.org

EMERGENCY SEARCH OF HOME LAWFUL

R. v. Wu, 2008 BCCA 7

At about 8:00 a.m. police received a telephone call from a pay phone at a mall reporting that there was an injured person at a residence owned by the accused. A police officer went to the mall to investigate whether the call was a hoax but nothing useful was discovered. Police attended the house and examined its perimeter. There were no signs of forced entry but condensation on the windows and a hydro meter spinning at a high rate of speed was noted. A computer check revealed the residence was a possible marijuana grow operation. The exterior examination indicated the possibility of a marijuana grow operation and two separate suites in the house.

Officers knocked on the front door but received no answer. An officer heard what he believed was someone exiting the house at the back of the premises and when it was checked it out the accused was found standing at the back near the bottom of a staircase. He was promptly detained in handcuffs, searched, and questioned by police. When asked on more than one occasion whether there was someone injured at the house the accused responded in the affirmative. The police took him to the rear door and requested he ask the occupant of the premises to let them in. The door was opened by the accused's girlfriend from inside the residence and police entered and checked the rooms on the main floor. From the time of the initial telephone call to the time of entry was about a half hour.

While in the house police discovered two women and a child and noted a strong smell of marijuana. A door leading to the downstairs portion of the house that had a combination padlock on it was forced open and a marijuana grow operation was discovered. The accused and his girlfriend were arrested and transported to police headquarters. A search warrant was subsequently obtained for the sophisticated grow operation.

At trial in British Columbia Provincial Court the accused was charged with producing marijuana and possession for the purpose of trafficking. He argued

that the initial search of the premises was warrantless and therefore a breach of his *Charter* rights.

The trial judge found the police had received what was believed to be a 911 call. They tried to locate the caller to determine the nature of the caller's concern, but were unable to do so. They then attended the home to investigate. The accused confirmed that someone in the house was injured and a complete search of the house by police was inevitable. Although these efforts took some time, it did not detract from the necessity for the police to enter the house and search all of it. The trial judge was satisfied that the police were motivated by the need to ensure that no one in the house needed assistance, rather than their conclusion respecting the likelihood of finding a marijuana grow operation.

"It seems appropriate to observe that, on occasion, premises where marijuana grow operations exist have been scenes of violence and injury. The police officers attending at the house would be entitled to take account of such circumstances in assessing the likelihood or possibility that there could be an injured person inside this house who needed assistance."

"The reluctance of the occupants to respond to the police presence, [the accused's] sudden appearance at the rear of the house, his confirmation that someone inside needed help, and his assertion that the occupants were frightened, increased the concerns of the officers", said the trial judge. The trial judge held that the accused's *Charter* rights were not breached and the evidence was admissible. He was convicted and given a nine-month conditional sentence order and the residence where the drugs were found was ordered forfeited.

The accused appealed to the British Columbia Court of Appeal again arguing, among other things, that the search was a *Charter* violation. He submitted that the type of phone call that precipitated police attendance to his house has, on occasion, been found to be a ruse and the police should have been more alive to this. He contended the trial judge should have found the police were suspicious of the call's bona fides, since they visited the mall to check it out. The real reason for the entry and initial search, he submitted, was related to suspicions of a marijuana grow operation and was not a search for a person needing assistance.

Justice Hall, in authoring the Court's unanimous judgment, first noted that a warrantless search is *prima facie* unreasonable and that an individual enjoys a high expectation of privacy in their residence. However, a police search may be permitted in possible emergency situations, which are essentially fact driven cases. In upholding the trial judge's conclusion that the initial entry into the house was not motivated by suspicions of a marijuana grow operation, but was rather to ascertain whether someone in the house needed assistance and thus lawful, Justice Hall stated:

> It seems appropriate to observe that, on occasion, premises where marijuana grow operations exist have been scenes of violence and injury. The police officers attending at the house would be entitled to take account of such circumstances in assessing the likelihood or possibility that there could be an injured person inside this house who needed assistance. I consider there was a sufficient evidentiary basis for the judge to conclude, as she did, that the police were motivated by safety concerns at the time they made their warrantless entry into this house. I would not disturb her factual finding on this issue.
>
> When the police entered the premises, they simply made a cursory search of the premises to make certain that no one was injured or needed police assistance. When they had satisfied themselves as to this, they left the premises and obtained a search warrant before conducting a full investigation of the basement area where the marijuana was being grown. In my view, the police did not go beyond what was necessary and appropriate in their initial search of the house. Their conduct was justifiable having regard to all the circumstances. [paras. 16-17]

The accused's conviction appeal was dismissed.

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

Note-able Quote

"Jumping at several small opportunities may get us there more quickly than waiting for one big one to come along" - Hugh Allen

SEARCH GOING BEYOND AUTHORIZING PROVISIONS UNREASONABLE

R. v. Dreyer, 2008 BCCA 89

Two police officers stopped a car driving with its tail lights off. The accused was in the front passenger seat while his sister was driving. Their father was the registered owner of the car, and the sister was listed as the principal driver. The police looked in the car and saw an opened 1.2 litre bottle of beer on the floor behind the driver's seat, an offence under s.44 of British Columbia's *Liquor Control and Licensing Act* (*LCLA*). The accused and his sister were told to get out of the car and stand behind it while it was searched under s.67 of the *LCLA*, which allows police to search any person and anywhere, except a residence, when there are reasonable and probable grounds to believe that liquor is, anywhere or on anyone, unlawfully possessed or kept, or possessed or kept for unlawful purposes.

The officer conducted a thorough search, including looking under the windshield visors. He saw a crumpled brown paper bag in the space between the driver's seat and centre console. He moved the bag to look for liquor beneath it and in doing so, felt objects in the bag which suggested drug flaps. He opened the bag and found four packages of cocaine, each containing half a gram. The occupants were arrested for possession of a controlled substance and a search of the car for drugs was carried out. Under the front passenger seat, the officer found a plastic Ziploc bag which contained two paper packages of cocaine, also one-half gram each.

At trial in British Columbia Provincial Court the accused argued the drugs found during the liquor search were inadmissible because the police breached s.8 of the *Charter*. The officer testified he knew there was no liquor in the paper bag but was suspicious of its contents. And he did not think he had grounds to arrest before he opened it. In feeling the paper bag to get an idea of what was inside, the officer said he was trying to ascertain if there was something there that was going to be evidence or an officer safety risk, or whether it was just garbage.

The trial judge, however, rejected the accused's arguments. In his view, the search of the bag was not unreasonable. "When the officer reached into the area between the driver's seat and the centre console, that was a reasonable part of his search as he had found liquor in such an area on prior occasions and … it seems like a reasonable place to look for liquor in circumstances such as this," said the judge. When he found the bag it was also reasonable for him to pick it up and move it, thereby feeling what he suspected was illegal drugs—given his previous experience and training. Although he may not have felt he had sufficient grounds to make an arrest, he nonetheless had reason to open this bag and look inside it. And even if there was a *Charter* violation, the trial judge would have ruled the evidence admissible. As a result, the accused was convicted of possessing cocaine for the purpose of trafficking.

The accused then appealed to the British Columbia Court of Appeal arguing, among other things, that the search was unreasonable, breached his s.8 *Charter* rights, and the evidence was inadmissible. The three member panel hearing the appeal unanimously agreed. Justice Donald, delivering the opinion of the Court, ruled the trial judge erred in holding the *LCLA* authorized the search.

The Search

Justice Donald ruled the police could not rely on the search provisions of the *LCLA* when the officer looked in the bag knowing it did not contain liquor nor could he rely on officer safety reasons:

"A search without legal authority is an unreasonable search within the meaning of section 8."

> A search without legal authority is an unreasonable search within the meaning of section 8. A search for liquor was in this case authorized by section 67(2) of the Liquor Control and Licensing Act, by reason of the open beer bottle. But the Act does not authorize a blanket search. The officer turned up the drugs knowing full well that the bag contained no alcohol.
>
> As mentioned, the officer testified that he was motivated by safety concerns in opening the bag. Safety can be a valid purpose for a search incidental to arrest…. But here the [accused] was detained outside the car at the time of the search, and in the circumstances it is hard to imagine any hazard to the officers or the public.
>
> ……

> If in the course of a liquor search illicit drugs come into plain view, seizure can be valid. This is not such a case. What the judge has permitted is an expansion of a search authorized for a limited purpose to a general search for contraband on a hunch. He has allowed the police to rummage for whatever might look suspicious, regardless of the authorized limits of the search. This is a serious error in law. [references omitted, paras. 18-21]

Thus, the Appeal Court found the police exceeded the scope of what the *LCLA* search powers authorized.

Admissibility

The Appeal Court also found the trial judge erred in his s.24(2) analysis, which was improperly skewed by his earlier findings. Although the evidence was non-conscriptive and would not affect trial fairness, the *Charter* breach was serious. In noting that the officer offered an unsupportable safety reason for opening the bag, Justice Donald stated:

> [The breach] represents a deliberate abuse of a limited power to search, and the officer showed bad faith in trying to justify it on a spurious claim of safety. Such an abuse cannot be shrugged off as merely trivial; it must be condemned by a decision to exclude the evidence, so that the Charter will be seen to matter in actual cases and not just in theory. The reputation of justice will be harmed by allowing this improperly obtained evidence to lead to a conviction. [para. 27]

He ruled the police conducted a search under a limited auspices for liquor and intruded on the accused's privacy interest in his property to find something the officer knew could not have been liquor and could not have threatened the safety of the police or the public. The integrity of the justice system requires the police respect the privacy of a motor vehicle occupant's personal effects. In signalling the importance of this right and discouraging overzealous searches, Justice Donald excluded the evidence.

As a consequence, the accused's conviction was set aside and an acquittal was entered.

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

s.10(a) BREACH RESULTS IN STATEMENT EXCLUSION

R. v. Nguyen, 2008 ONCA 49

Police executed a *Controlled Drugs and Substances Act* search warrant to search a house, but found it to be unoccupied. A sizeable marijuana grow operation was located in the basement. As an officer left the house to change into a protective suit in preparation of dismantling the grow operation, he saw a van driven by the accused pull into the driveway. The accused, a Vietnamese immigrant, briefly stopped his van and then began to leave the driveway in reverse. The officer was wearing a vest with the word "Police" in large white letters, approached the van, stated "Police, stop", and asked the accused if he lived there. He said he did. He was then arrested for production and possession of marijuana and advised him of his right to counsel.

At trial in the Ontario Court of Justice, the Crown relied almost exclusively on the accused's answers to the officer connecting him to the grow operation, thereby establishing knowledge and control of it. The officer testified he believed he could detain the accused at common law, but did not immediately advise him of his s. 10(b) *Charter* rights because it would not make sense to extend the detention if the accused was unconnected to the residence. The trial judge ruled that the accused was detained when the police officer told him to "stop" and his *Charter* rights under s. 10 had been violated. However, the trial judge admitted the evidence under s.24(2) and convicted the accused of producing marijuana and sentenced him to five months imprisonment.

The accused then successfully appealed to the Ontario Court of Appeal arguing the trial judge erred in failing to exclude his statement. The Crown did not contest that the officer failed to comply with s.10(a) of the *Charter*, which requires that a detainee be advised of the reasons for arrest or detention "promptly", or that there was any impediment to the officer's ability to quickly inform the accused of the reason for stopping him before asking him any questions concerning the residence.

In this case, the police had executed a search warrant and were in the process of investigating a

grow-op. The accused was the subject of an investigative detention and his questioning was in the context of a heightened degree of criminal jeopardy, which demanded that particular attention be paid to the informational component of s.10(a). Section 10(a) enshrines a detainee with the right to be informed of the reasons for detention. This information is important with respect to two aspects; (1) a person is not obliged to submit to an arrest if he does not know the reason for it and (2) its adjunct to the right to counsel conferred by s.10(b) of the *Charter* (a person can only exercise their s. 10(b) right in a meaningful way if they know the extent of their jeopardy). Providing reasons is really part of the detaining or arresting process itself and does not need to be expressed in technical or precise language, but must inform the person as to the reason why the restraint is being imposed. The word "promptly", found in s.10(a) means immediately, as opposed to "without delay", found in s.10(b), which does not necessarily convey the notion of immediacy. Here, it would have been simple for the arresting officer to provide the accused with the information that led to his detention. The officer could easily have said "Police, stop, we're investigating a marijuana grow op in this house."

"Once detained, an individual is at the mercy of state actors. Thus, in circumstances where the informational component of s.10(a) of the Charter is easy to fulfill – as it was in this case – the breach of the obligation to provide that information cannot be considered a trivial matter ... [b]ecause ... the right against self-incrimination is fundamental to the spirit of s.10 of the Charter."

The Crown submitted, however, that the breach of the accused's s.10(a) rights was so minor that the evidence of the oral statement should not to be excluded. The Court responded:

> Once detained, an individual is at the mercy of state actors. Thus, in circumstances where the informational component of s. 10(a) of the Charter is easy to fulfill – as it was in this case – the breach of the obligation to provide that information cannot be considered a trivial matter. We say this because, as the jurisprudence illustrates, the right against self-incrimination is fundamental to the spirit of s. 10 of the Charter.
>
> It is conceded that the [accused's] s.10(a) right was violated in this case. The violation of that right gave rise to the very evidence that resulted in the accused's conviction. Had the information required by s.10(a) been conveyed to the [accused], he may not have answered the police officer's questions, and the police thus may not have obtained the evidence relied on by the Crown to obtain the [accused's] conviction. [paras. 21-22]

In determining the admissibility of unconstitutionally obtained evidence pursuant to s. 24(2) of the *Charter* a court must apply a threefold test; (1) would the admission of evidence affect the fairness of the trial, (2) the seriousness of the constitutional misconduct, and (3) the effect on the administration of justice.

The accused's oral statement made to police in response to questioning was conscriptive evidence, which would generally tend to render a trial unfair if admitted. He was compelled as a result of a *Charter* breach to participate in the creation or discovery of self-incriminating evidence. And there was nothing to mitigate this trial unfairness. He was given no advice about his right to counsel or about why he was being detained. Nor was there anything about the officer's initial question that suggested answering could give rise to criminal jeopardy. The accused had no basis for making an informed choice about whether or not to answer the officer's question. And his statement did not bear the hallmarks of reliability associated with real evidence. Nor did the officer in this case think he had not detained the accused. Instead, he specifically ordered the accused to stop. Even if the officer did not intentionally breach the accused's s.10(a) rights, they were engaged and could easily have been respected.

As a result, the question posed by the officer, "Do you live here?", compromised the accused's right against self-incrimination. Because he answered in the affirmative, a conviction followed. In the Ontario Court of Appeal's view, the admission of the oral statement rendered the trial unfair. Thus, failing to exclude the statement would bring the administration of justice into disrepute. The accused's conviction was set aside. However, since the arresting officer found a key to the residence on the accused's person, which was other evidence capable of connecting him to the grow operation, a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

GUN PARTS MUST BE AVAILABLE AT ROBBERY SCENE

R. v. Smith, 2008 ONCA 151

The accused was charged with numerous robbery, disguise, and weapons offences in the Ontario Superior Court of Justice. Although a gun entered into evidence did not have a breech bolt, an expert testified that it was easy to insert a breech bolt and thereby make the gun operable. He also testified that breech bolts could be readily obtained and said he made a phone call to a store and could have a breech bolt shipped in a matter of days at a cost of $40. As well, there was no need for a permit for such a purchase. There was, however, no evidence that a breech bolt was available during the robberies. The accused was nonetheless convicted of 24 offences and was sentenced to 8 years in custody in addition to 5 years of pre-trial custody.

He appealed to the Ontario Court of Appeal submitting that the gun had no breech bolt and it was therefore not operable and not capable of being fired. In his view, the trial judge erred in determining the gun used was a "firearm" as defined in s. 2 of the *Criminal Code*.

The Ontario Court of Appeal agreed. In *R. v. Covin* (1983) the Supreme Court of Canada explained that an inoperable gun will still be a firearm if parts are available on scene during the commission of the offence that could render the gun capable of firing and causing serious injury. In this case, however, there was no evidence that parts were available "on the scene". Therefore, the trial judge erred in finding that the rifle in question was a "firearm" within the meaning of the *Criminal Code*.

Nor did the Appeal Court accept the Crown's alternative argument that the rifle could have been fired by striking a nail against the cartridge. There was no evidence that a nail and something suitable to strike it with were available on the scene. Three convictions of robbery with a firearm were quashed and convictions for robbery with an imitation firearm were substituted while two convictions for pointing a firearm were quashed and acquittals entered.

Complete case available at www.ontariocourts.on.ca

Firearm Phrases

Breech Bolt—a mechanism which opens and closes the breech in a firearm, such as a rifle, machine gun, etc.; designed to push a cartridge into the chamber by sliding action.

'FINDS COMMITTING' TRIGGERED BY DETECTION OF CRIME IN PROGRESS

R. v. Abel & Corbett, 2008 BCCA 54

In response to learning of a break in at a neighbour's house, the accused Abel searched his own home and discovered that a rifle he had hidden was missing. Through making his own enquiries in the area, Abel learned that Mr. Holl, a man with a serious drug problem and a long record for property crimes, offered to sell a local drug dealer the rifle. After the rifle was not returned, Abel decided to take action to retrieve it. Along with Corbett (armed with a tire iron) and another man (armed with a wooden bat), Abel went to a townhouse where it was believed that Holl was staying. A physical altercation occurred between the men and Corbett hit Holl with the tire iron. Holl was overpowered, restrained using zap straps, and directed the men to a dental office where the rifle, which was hidden under a wheelchair ramp, was recovered. Holl was then taken to the police station where he was turned over because Abel believed there was an outstanding warrant for his arrest.

When police learned what had happened and investigated the matter, the men were charged with break and enter (s.348(1)(a)), assault with weapons (s.267(a)), unlawful confinement (s.279(1.1)(b)), and possession of weapons for a purpose dangerous to the public peace (s.88(1)). At trial in British Columbia Supreme Court the men submitted that the concept of citizen's arrest should be left with the jury for the purposes of considering whether their actions were justified. Since possession is a continuing activity, and constructive possession constitutes possession in law, they argued Holl was "found committing" the offence of possessing stolen

property at the townhouse and they were therefore entitled to arrest him under s.494(1)(a). The Crown, on the other hand, contended that possession could not be given such a broad meaning in the context of a citizen's arrest.

The trial judge agreed with the Crown and ruled that the meaning of "finds committing" under s.494 was not available in the circumstances of the case. Rather, the section requires immediacy and an arrest based upon personal observation, which did not occur here. The jury was instructed that the men were not entitled to arrest Holl and any such arrest would be unlawful. Abel was convicted of being unlawfully in a dwelling house and assault, Corbett of possession of a dangerous weapon, and the third man was acquitted of all charges.

The accuseds then appealed to the British Columbia Court of Appeal arguing, in part, that a citizen's arrest for the offence of possessing stolen property is lawful even when the person being arrested does not possess the stolen property at the time and place of the arrest. In their view, the "finds committing" requirement in s. 494(1)(a) applies to a person who is in constructive possession of a stolen item.

Section 494 of the *Criminal Code* allows any one to arrest without a warrant a person they find committing an indictable offence. Possession as defined under s.4(3) includes a person knowingly having anything in any place, whether or not that place belongs to or is occupied by them, for their or another's use or benefit. Under this concept, a person who exercises some measure of control over an item can be "in possession" of the item even though it is not in their personal possession. Both theft of a rifle and possession of it knowing it was stolen are indictable offences.

The accuseds suggested that Holl retained possession of the stolen rifle regardless of where it was located. As such, they argued that when they encountered Holl at the townhouse he was "in possession" of the rifle and therefore was "found committing" the indictable offence of possessing stolen property. Thus, in their view, they were authorized to arrest him under s.494(1)(a) and their lack of information regarding the whereabouts of the rifle was irrelevant.

"From the beginning, Canadian courts have interpreted the words 'finds committing' as pertaining to situations where the person being arrested is discovered in the very act of committing an offence."

Justice Frankel, writing the opinion of the Court, disagreed with this interpretation of "finds committing". He examined the common law roots and historical statutory usage of the "finds committing" expression and ruled "it connotes a situation where the arresting party comes upon someone in the very act of committing an offence. In other words, criminal activity must be taking place in the presence of the arresting party." He found this opinion was further supported by the French version of other federal statutes that authorize arrest on the basis of "finds committing." He stated:

> From the beginning, Canadian courts have interpreted the words "finds committing" as pertaining to situations where the person being arrested is discovered in the very act of committing an offence… [para. 45]
>
> Most importantly, in my view, the Supreme Court of Canada has interpreted the power to arrest on the basis of "finds committing" as one which is triggered by the detection of a crime in progress. [para. 51]
>
> In the context of a citizen's arrest under s. 494(1)(a) of the Code, this means that before a citizen can effect an arrest, he or she must have reasonable grounds to believe that the person to be arrested is apparently in the process of committing an indictable offence in his or her presence. [para. 52]

And further:

> Parliament clearly intended the words "finds committing" to have the same meaning whenever used in authorizing an arrest without warrant. It is, therefore, appropriate to construe the English version of the Code having regard to how this power has been expressed in French in these other enactments.
>
> The French version of "finds committing" in the more recent enactments is "qu'il prend (qu'ils prennent) en flagrant délit d'infraction", meaning "to be caught in the act" or "caught red-handed." In other words, the detection of a crime in progress.
>
> To the extent that the expressions "finds committing" and "qu'il trouve en train de

> commettre" used in the Criminal Code may be ambiguous, which I do not think they are, any ambiguity is resolved by having regard to how Parliament has expressed itself in French in these other statutes. The interpretation common to all versions in both official languages, i.e., their shared meaning, is that the person effecting the arrest must have come upon someone who, at that very moment and at that very place, is engaged in criminal activity. [paras. 61-63]

As a result, Justice Frankel found that the accuseds had no information as to where the rifle might be nor did they come upon Holl in possession of it, even though they reasonably believed he had stolen it. They therefore could not justify their actions on the basis that Holl was "found committing" the offence of possessing stolen property at the townhouse. The accuseds appeal was dismissed.

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

STATEMENT ADMISSIBLE DESPITE WISH TO EXERCISE RIGHT TO SILENCE

R. v. Borkowsky, 2008 MBCA 2

A 17 year old complainant reported she had been sexually assaulted by her 66 year old supervisor at a gravel pit. The incidents included the touching of her breasts and vaginal area, kissing, oral sex and intercourse. Police arrested the accused and interviewed him for about an hour, which was recorded on video and audio tape. He informed the police on nine occasions that he had been advised by his lawyer not to make a statement (remain silent) and wished to do so, but they continued to question him anyway. He eventually made a statement, which was primarily exculpatory, but he did confirm his presence at the gravel pit.

"The police are permitted to endeavour to persuade an accused or suspect to break his or her assertion of the right to silence by legitimate means. It is only where there is an abuse of that persuasion will a suspect's right to silence under s.7 be said to be breached."

Following a *voir dire* in the Manitoba Court of Queen's Bench, the trial judge held that the accused's statement to police was voluntary and did not infringe his right to silence. She stated:

> In the circumstances before this Court, I do not believe that [the accused] was deprived of his operating mind nor was his will overborne. [The officer's] questioning was purposeful, but was in no way oppressive. The police are permitted to endeavour to persuade an accused or suspect to break his or her assertion of the right to silence by legitimate means. It is only where there is an abuse of that persuasion will a suspect's right to silence under s. 7 be said to be breached. In this case, I find that [the accused] was not deprived of his right to remain silent. He chose to respond after being persuaded to answer [the officer's] questions.

Although the Crown chose not to tender the statement as evidence, they reserved the right to use it in cross-examination should the accused testify, which he did not. Therefore, his statement was never used. He was convicted and sentenced to three years' imprisonment.

The accused appealed to the Manitoba Court of Appeal arguing, among other grounds, that his right to silence had been infringed. He submitted that he might have testified if the statement had not been available to the Crown for the limited purposes of cross-examination. Therefore, the outcome of the trial may have been different.

Justice Steel, authoring the unanimous decision for the Manitoba Court of Appeal, found it was not a violation of s.7 of the *Charter* for a police officer to continue to question a detained person who has asserted a right to remain silent. Citing the recent Supreme Court of Canada decision of *R. v. Singh* (2007), which rejected the notion that a suspect's assertion of the right to silence requires police to stop questioning, Justice Steel noted the longstanding rule that entitles police to continue questioning so long as their conduct does not reach the point where the suspect's will is overborne, which would render a statement involuntary. As for this case, he stated:

> [T]he accused was appropriately charged and cautioned on two separate occasions. He was interviewed by police after he was permitted to

speak with his lawyer. The accused indicated to the interviewing officer that he had been instructed by his counsel not to make a statement or speak to the police.

The interviewing officer employed a technique similar to the one used by the officer in Singh – setting out the facts known to the police and the allegation made by the complainant, then asking for the accused's version of events. The interviewing officer also spoke with the accused about matters unrelated to the charge, after which the accused began discussing the allegations with the officer.

As in Singh, the statement eventually made by the accused was not a confession, though it confirmed his presence with the complainant at the gravel pit. As such, the statement was primarily exculpatory. However, unlike Singh, the accused's statement was only admitted for the limited purpose of cross-examination if the accused testified. As the accused chose not to testify, the statement was never received as evidence. In Singh, Singh's statement was admitted as evidence and considered by the trial judge. [paras. 40-42]

And further:

In such cases, deciding whether the trial judge erred will be a factual determination based on the evidence adduced. If I compare the factual circumstances in this case with the Singh case, the persistent questioning in Singh was much worse, yet the court held that Singh was not deprived of the right to choose nor was his operating mind affected.

The transcript of the questioning in this case reveals a similar situation. The videotaped statement, which was reviewed by the trial judge, took approximately one hour. The trial judge had the opportunity to determine voluntariness by having the opportunity to observe the form and contents of the statement as well as the demeanour of the accused. In her reasons, she reviewed the manner of the questioning, the accused's response and his demeanour, as well as the duration of the questioning and the amount of time the accused was housed in cells before providing his statement. She concluded [there was no reason to suspect the voluntariness of the accused's statement, no evidence provided of an improper threat or promise, oppression, nor was there any overt police trickery, that he had an operating mind, and that no inducements were offered sufficient to raise a reasonable doubt that his will had been overborne].

With respect to the right to silence, the accused raised on nine occasions during the course of his interview by the police the fact that he had received the advice of counsel to remain silent and wished to rely upon it. It was argued by counsel that on each of those occasions, the police officer skilfully engaged in a conversation with the accused where he would repeatedly return to certain relevant issues intermingled with discussion concerning matters such as striking a deer, bears, construction, gravel and moral issues. In doing so, he effectively overcame the accused's assertion of his right to remain silent.

Given the trial judge's conclusion on the issue of voluntariness, her conclusion as to the right to silence is not surprising. She correctly identified that the issue to consider was whether in this case the questioning went too far and, in essence, deprived the accused of an operating mind and the ability to make a meaningful choice whether to speak. Applying that test to the facts at hand, she concluded [the accused was not deprived of his right to remain silent, but rather he chose to respond after being persuaded to answer the officer's questions]. [paras. 44-47]

The trial judge correctly stated and applied the law to the facts of the case. The accused's appeal was dismissed.

Complete case available at www.canlii.org

DRIVER's CONDUCT WAS NOT SPONTANEOUS or REFLEXIVE WHEN FLEEING POLICE

R. v. Chiasson, 2008 ONCA 90

The accused was driving his mother's car when he was signalled by a police car to stop. Although he saw the signal, he continued driving for some distance before finally stopping in a residential driveway. The police officer approached the car, held the accused's shoulders through the open car window, and told him that he was under arrest. The accused put the car into gear and applied the accelerator, knocking the officer to the ground. The car ran over the officer's leg and caused non-permanent ligament injuries. The

accused parked the car a short distance away and fled into a marshy area. He was subsequently apprehended, but only after failing to respond to an order to put his hands in the air, resisting arrest, and attempting to grab a gun from an arresting officer's holster.

At trial in the Ontario Superior Court of Justice the accused was convicted of several offences, including dangerous driving causing bodily harm. The trial judge concluded the accused's conduct was intentional. He was sentenced to eighteen months in jail, three years probation, and given a five-year driving prohibition and a three-year weapons prohibition.

The accused appealed to the Ontario Court of Appeal arguing, among other things, that the trial judge erred in holding his conduct of putting the car in gear and pressing the accelerator when he knew the police officer's arm was in the car was not a panicked reflex reaction to his apprehension. The Appeal Court, however, found no error:

> In concluding that the [accused's] conduct was intentional, the trial judge considered the [accused's] conduct in the context that the [accused] acknowledged his initial failure to stop for the officer, he knew when he did stop that the officer was approaching his car to speak with him, he knew the officer's arm was in the car and he knew that he was under arrest. In these circumstances, the [accused's] response in accelerating the car could not be said to be either spontaneous or reflexive. Rather, it was a considered response taken to avoid arrest.

The accused's appeal from dangerous driving was dismissed.

Complete case available at www.ontariocourts.on.ca

WAITING FOR TOW TRUCK AN OK DELAY IN ASD CASE

R. v. Ritson, 2008 BCPC 26

Police stopped the accused shortly after midnight for speeding. The officer smelled alcohol on the accused's breath and she admitted drinking. She failed a roadside screening test giving the officer grounds to make a breathalyzer demand. The breathalyzer demand was given along with a 24 hour driving prohibition. The officer called for a tow truck and waited for its arrival or for another officer to wait with it. From the time of the demand until the investigating officer left the scene with the accused was 24 minutes. She subsequently provided two breath samples over the legal limit and was charged with impaired driving and driving over 80mg%.

At trial in British Columbia Provincial Court the accused argued that it was not reasonable for the officer to await the arrival of the tow truck or the other officer before taking the accused to the police station for the breathalyser test. The wait, the accused submitted, caused an unreasonable delay in the taking of the breath samples. Therefore, the breath samples were not taken as soon as practicable as required by legislation. The Crown, on the other hand, contended that the delay should be considered from when the accused was placed in the police vehicle, rather than when the demand was made. As well, another officer was called to attend to wait for the tow truck, which reduced the delay. The Crown submitted that the wait was part of police work directly related to the investigation and was reasonable in the circumstances.

Judge Baird Allen agreed with the Crown and found the delay in this case was not unreasonable. Although the onus was on the Crown to account for the delay, which was 24 minutes, the officer said he was awaiting the arrival of the tow truck or another officer to watch the car. Even though the officer's evidence did not establish that the vehicle was towed under the *Motor Vehicle Act*, which in Judge Baird Allen's view was intended to authorize the towing of a vehicle to prevent the commission of an offence where a driver is served at roadside with a prohibition, and is not arrested, the calling of the tow truck in these circumstances and the wait for the arrival of the second officer was reasonable. She also noted that standard police policy to have vehicles towed when the driver and sole occupant is arrested for impaired driving, could, by itself, be sufficient reason for towing, such that a consequent delay would not be unreasonable. Here though, the officer took the additional step of getting another officer to attend so that less delay was occasioned.

Complete case available at www.provincialcourt.bc.ca

DANGER AN ESSENTIAL ELEMENT IN CARE & CONTROL OFFENCE

R. v. Mallery, 2008 NBCA 18

A police officer located the accused's truck parked in the parking lot of a local bar about 20 minutes after receiving a call from an a motorist who had been cut off by it. The officer parked his vehicle some 150 to 200 feet from the accused's vehicle to complete some paperwork when, a few minutes later, he heard the truck being started. The vehicle's lights were on and the accused was behind the wheel. But within seconds, the accused turned the ignition and lights off, got out of the vehicle and headed back towards the bar entrance. The accused stopped after the officer got out of his vehicle and ordered him to do so. He was arrested for "care or control" and subsequently charged with over 80mg% contrary to s. 253(b) of the *Criminal Code* after providing breath samples over the legal limit.

At trial in New Brunswick Provincial Court the accused testified that he made arrangements for the bartender to take him home. However, while in the bar another patron informed him that the lights to his truck had been left on so he went outside and started his vehicle to see whether the battery was dead and whether the lights would go out. When the engine turned over, he turned off the lights and the ignition, got out of his truck, and headed back to the bar. He did not know he was being watched by police and just as he was about to enter the bar, he was arrested. The trial judge found the accused was in his vehicle for only a "brief moment" and accepted his evidence that he did not intend to drive, thereby rebutting presumptive care or control. The judge also concluded the accused was not in actual care or control because his interaction with the vehicle did not pose a risk of danger to the public.

The Crown appealed and the New Brunswick Court of Queen's Bench found the trial judge erred, set aside the acquittal and ordered a new trial. The accused then appealed to the New Brunswick Court of Appeal arguing the appeal judge erred by not finding "danger" an essential component to care and control. The Crown, on the other hand, submitted that a sufficient interaction test only requires the accused perform sufficient acts with the vehicle's fittings or equipment and that danger is not an essential element. Thus, in the Crown's view, once the accused started the truck the offence was complete.

After reviewing the applicable case law, Justice Robertson, writing the opinion of the New Brunswick Court of Appeal, concluded that care or control does require a finding of danger as an essential component of the offence. As Justice Robertson noted, "The concept of danger provides a unifying thread which promotes certainty in the law while balancing the rights of an accused with the objectives of the legislation." He wrote:

> If danger is not already an essential element of the offence, it should be, with one exception. In cases where the Crown invokes the statutory presumption and the accused is unable to rebut it, the accused is deemed to have care or control of the vehicle pursuant to s. 258(1)(a) of the Criminal Code. Hence, there is no need to embark on a danger inquiry. This leads us to identify valid policy reasons for accepting that danger is otherwise an essential element of the offence. I begin with the proposition that such an element is consistent with the purpose and objectives of the legislation. The provisions of the Criminal Code dealing with impaired driving have as their immediate objective the elimination of harm to the public. Section 253 makes it an offence to operate a vehicle (drive) when one's ability to do so is impaired by alcohol or, if the vehicle is not in motion, to have care or control of it. This provision empowers police officers to detain and arrest those who pose an immediate or potential threat to public safety. Those caught driving while impaired represent the immediate threat. Those who have care or control represent a potential threat or risk of harm. The elimination of danger or risk of harm is central to the objectives of the legislation. Hence, one would assume that if a person's interaction with his or her vehicle did not pose an immediate or potential risk of harm or risk to public safety, a conviction under s. 253 would not fall within the objectives of the legislation. In other words, courts should not be convicting those who do not represent this threat. Legally, it makes no sense to eliminate danger as an essential component of the offence and to insist that a conviction can rest on the extent of the accused's interaction with the vehicle's fittings or equipment (the "sufficient interaction" test). Intuitively, every lay person

knows that someone sitting drunk behind the wheel of car, with the motor running, has care or control of the vehicle, but it falls to the legally trained to explain why in criminal law the concept of care or control involves more.

It is easier to defend the position that danger should be an essential element of the offence by attacking the validity of the sufficient-interaction test for assessing care or control. It seems draconian in the age of the Charter to hold that a person may be convicted of having care or control of a vehicle while impaired, even though the accused had no intention of putting the vehicle in motion and the facts do not otherwise support a finding of risk to public safety. To hold that neither the intent to drive nor the presence of danger is an essential element of the offence is to risk the criticism that the offence bears too close a resemblance to an absolute liability offence. Admittedly, the mens rea for the offence persists (the intent to assume care or control after the voluntary consumption of alcohol), but the notion that the accused cannot speak to his or her presence in a vehicle while in a state of inebriation is arguably inconsistent with fundamental principles of criminal law. Indeed the whole purpose of having the statutory presumption set out in s. 258(1)(a) of the Criminal Code is to protect the public interest without exposing an accused to an absolute liability offence. [paras. 46-47]

And further:

Accepting that danger is an essential element of the offence of having care or control of a vehicle, it is still incumbent on this Court to apply the proper analytical framework to determine whether the trial judge erred in acquitting the [accused]. My understanding of the law is as follows. In care or control cases, the ultimate task of the trial judge is to decide whether the Crown has met the burden of establishing beyond a reasonable doubt that the accused's interaction with his or her vehicle presented a danger or, as it is sometimes phrased, a "risk of danger" or a "risk to public safety". If the facts establish beyond a reasonable doubt a risk of the accused putting the vehicle in motion, either intentionally or unintentionally, or if the facts otherwise support a finding of danger (such as from parking one's car in the middle of a public thoroughfare), then care or control will have been established. Obviously, this is a general framework. While an intention to drive (to put the vehicle in motion) is not an essential element of the offence, if proven a conviction may follow. In that regard, the Crown has the option of invoking the presumption set out in s. 258(1)(a) of the Criminal Code. If it is established that the accused occupied the driver's seat, the onus falls on the accused to show that, on a balance of probabilities, it was not for the purpose of setting the vehicle in motion. An accused who fails to rebut the presumption will be deemed to have had care or control of the vehicle and, subject to any other defences, a conviction will follow. Moreover, the failure to rebut the presumption has the legal effect of dispensing with the need to conduct a danger inquiry. If, however, the accused rebuts the presumption, the Crown is still entitled to establish "actual" care or control by proving that there was a risk of putting the vehicle in motion unintentionally or of posing in some other manner an immediate danger to public safety. In applying this general framework, the trial judge must have regard to all of the surrounding circumstances leading up to the intervention, typically by the police. Above all else, it is impermissible for the trial judge to isolate certain facts and to deem those facts sufficient for purposes of establishing a risk to public safety. One final point. With respect to the "sleeping it off" cases, the "change-of-mind" and "firm-plan" arguments are sometimes advanced and considered when dealing with the question whether the statutory presumption has been rebutted. In other cases, the trial judge may deal with those arguments after first ruling that the accused rebutted the presumption of an intention to drive. Either way, the result should be the same. [references omitted, para. 52]

Section 253(b) of the *Criminal Code* creates an offence for a person to have care or control of a motor vehicle, whether or not it is in motion, when their blood-alcohol level exceeds the statutory limit (80mg%). Care or control can be established in two ways; presumptive care or control or actual care or control.

Presumptive care or control is set out in s. 258(1)(a) of the *Criminal Code*. It establishes that once the Crown proves, on a balance of probabilities, that a person occupied the driver's seat of a motor vehicle, that person is deemed to have care or control of the vehicle unless the person establishes that they did not occupy the seat for the purpose of setting the vehicle in motion. In other words, a person can rebut

the presumption of care or control under s. 258(1)(a) by establishing on a "balance of probabilities"—not proof beyond a reasonable doubt—that they did not have the intention to drive. If the accused is unable to rebut the statutory presumption with respect to the intention to drive, the accused is deemed to have had care or control and danger is presumed.

Actual care or control is not concerned with a person's intent but rather with whether their interaction with the vehicle posed a "danger", or a "risk of danger" or a "risk to public safety". A person can still be convicted of care or control without an intent to drive if the Crown adduces evidence that the person performed acts indicative of care or control of the vehicle, so as to create a "danger". The Crown must establish a risk of the accused putting the vehicle in motion, either intentionally or unintentionally, or the facts must otherwise support a finding of danger (e.g. from parking one's vehicle in the middle of a public thoroughfare). It is not enough, however, to merely show the accused started the engine. The fact that a person was found inebriated, or with a blood-alcohol level exceeding the statutory limit, in the front seat, with the motor running is not necessary determinative of whether the person is in care or control. Each case must instead, be decided on its own facts. For example, some accused have been acquitted of care or control offences by asserting they were sleeping-it-off. Justice Robertson described these types of cases as follows:

> The typical sleeping-it-off case is one in which the police find the accused inebriated and sleeping behind the wheel of his vehicle. ... Sometimes the motor is running and sometimes it is not. Invariably, the accused is able to rebut the statutory presumption by persuading the trial judge that he did not occupy the driver's seat for the purpose of putting the vehicle in motion (driving). He simply wanted to sleep it off. If at the time the police intervened the motor was running, the accused will maintain that it was for the purpose of generating necessary warmth (the vehicle as "bedroom and heater" defence).

The Nova Scotia Court of Appeal found the appeal court erred and the acquittal was reinstated.

Complete case available at www.canlii.org

REASONABLE SUSPICION MUST BE THAT DRIVER HAS ALCOHOL IN BODY

R. v. Troung, 2008 BCPC 73

Police pulled the accused over for slowing down but not stopping at a stop sign. An officer went to the passenger side of the car and shone his flashlight in the car, noting the accused had glassy, glossy, and watery eyes. A second officer, who went to the driver's side, detected an odour of liquor and told his partner this. The officer then decided to administer a roadside screening test and gave a demand, but the accused refused. He was subsequently charged with refusing to provide a sample.

At trial in British Columbia Provincial Court the officer who gave the demand stated he formed a reasonable suspicion to do so because of the accused's eyes and the evidence of his partner who had informed him of an odour of liquor. Section 254(2) of the *Criminal Code* allows a police officer to demand a roadside breath sample using an approved screening device where they reasonably suspect that a person who is operating a motor vehicle has alcohol in their body.

As Judge Kitchen noted, "The key is that the officer making the demand have a reasonable suspicion as to the existence of alcohol in the body of the person being investigated." However, in this case the judge concluded the officer making the demand did not have the requisite grounds to make it and therefore it was not valid. He stated:

> I find the approved screening device demand was made on the basis of glassy eyes and an odour of liquor from somewhere. I am not satisfied that formed the basis for a reasonable suspicion the accused had alcohol in his body as required by s.254(2) of the Code.

The charge was dismissed.

Complete case available at www.provincialcourt.bc.ca

Note-able Quote

"Science may never come up with a better communication system than the coffee break" - Earl Wilson

ODOUR OF LIQUOR ON DRIVER's BREATH SUFFICIENT FOR ASD DEMAND

R. v. Wheeler, 2008 BCPC 37

A police officer observed a pick-up truck stopped at an intersection at 3:20 am without taillights. The vehicle turned left without signalling and the officer followed, activating the police emergency lights. The truck did not stop but continued for about one block. When the officer sounded the police siren the truck suddenly swerved to the left, then turned right where it came to a stop.

The officer approached the accused and told him he was stopped because his vehicle did not have functioning taillights. She asked him to provide his driver's licence and vehicle insurance, which he did without difficulty. As the officer spoke to the accused she observed he was somewhat flustered and noted an odour of alcohol coming from him as he spoke. The officer directed the accused to step out of his truck and saw him lean heavily on the doorpost and then stumble a couple of steps as he left the vehicle. His balance was unsteady and the officer again detected an odour of alcohol coming from his breath.

The officer knew the accused had been operating a motor vehicle and formed the suspicion he had alcohol in his body. She demanded he provide a sample of his breath for analysis using an approved screening device. He was subsequently charged with impaired driving and over 80mg%.

At trial in British Columbia Provincial Court the accused argued the investigating officer lacked the grounds necessary to demand a roadside breath sample, thereby breaching his s.8 *Charter* rights. As well, he submitted that the officer violated s.10(a) of the *Charter* because she failed to tell him of the reason for the detention.

In order for a police officer to demand a driver provide a sample of breath for analysis by an approved screening device the officer must have reasonable and probable grounds, objectively measured. In this case, Judge Rodgers found the officer subjectively believed she had reasonable and probable grounds for her suspicion. As for her objective grounds, the officer testified that her grounds for demanding a sample of breath were based on the following:

- the odour of alcohol;
- her knowledge that it was approximately the time for the bars to be closing;
- the accused did not stop when she activated the emergency lights on her police vehicle;
- the accused swerved to the left when the emergency siren was activated;
- the accused appeared flustered;
- he leaned heavily on the door when he exited the pick-up truck; and
- he stumbled after stepping out of the pick-up truck.

The accused contended, however, that the officer failed to take into consideration other observations suggesting his ability was not affected by alcohol consumption such as he was not slurring his speech, his balance was steady except when he left the vehicle, his fine motor coordination was unremarkable when he produced his driver's licence and insurance, and his driving was unremarkable except when he swerved after the police siren was activated.

Judge Rodgers, however, noted "the smell of alcohol on a driver's breath is sufficient for an investigating police officer to form the suspicion necessary to demand that the driver provide a sample of breath into an approved screening device." In this case, the officer detected an odour of alcohol coming from the accused's breath, which was sufficient to allow the officer to demand a breath sample. In addition, the officer had made other observations, such as the accused's driving, his initial difficulties in maintaining his balance, and the officer's knowledge that it was approximately time for the bars to be closing. These observations, along with the smell of alcohol, gave the officer reasonable and probable grounds to demand the breath sample. Observations that might lead to a conclusion the accused was not impaired were considered by the officer; but she nonetheless had sufficient grounds to form her suspicion. Judge Rodgers concluded the officer had reasonable and probable grounds, objectively measured, to form the suspicion necessary to

demand a sample of breath for analysis in the approved screening device.

As for whether the accused's rights under s.10(a) of the *Charter* were breached because the officer failed to advise him that he was under investigation for impaired driving rather than simply operating a vehicle without functioning tail lights, it could be inferred from the circumstances that he understood the basis for his detention. It was not necessary for the police to specifically inform the accused of the reasons for detention. Judge Rodgers concluded "that the circumstances were such that [the accused] must have understood the reason for his detention was that he was suspected of impaired driving and the police were pursuing an investigation based on that suspicion." There was no *Charter* violation and even if there was, it was trivial and inconsequential and the evidence was admissible under s.24(2).

The accused's application to exclude evidence was dismissed.

Complete case available at www.provincialcourt.bc.ca

NO REALISTIC OPPORTUNITY TO CONSULT COUNSEL BETWEEN TIME OF PULL OVER & ASD TEST

R. v. Johnson, 2008 BCPC 41

A police officer responded to a report of a possible impaired driver. He noticed a vehicle matching the description going past him on a highway and followed it for a couple of kilometres. The vehicle did not exceed the speed limit at any point, but weaved several times back and forth within the slow lane, where it stayed the whole time.

The officer stopped the accused and asked him for his driver's licence and his insurance papers. He told him he had a report of a possible impaired driver matching the vehicle's description. While having this conversation the officer noticed the accused would lean away from him and talk towards the vehicle with his face turned away, rather than facing him directly. The officer found this unusual and also noticed a very strong odour of mouthwash, some slurred words, and glazed and watery eyes. When asked if he had anything to drink, the accused said "no". And when asked a few more times the accused confirmed he had nothing to drink.

The officer asked the accused to step out of the vehicle. His purpose was to determine if the odour of mouthwash was coming from the accused or from someone else in the vehicle. The accused's balance was quite good but when asked again how much he had to drink he admitted he had one beer about 15 minutes earlier. The officer formed a reasonable suspicion that the accused had alcohol in his body and he was asked to sit in the front seat of the police vehicle for the purposes of taking a breath test on the approved screening device (ASD). From the time of the stop until he was asked to sit in the police car was 10 minutes. About five minutes later the officer read the screening device demand and the accused failed the test.

At trial in British Columbia Provincial Court the accused argued that the roadside breath sample was not taken forthwith and the right to counsel and the opportunity to contact counsel should have been given. In his view, s.254(2) of the *Criminal Code* requires the breath demand be made forthwith and the passage of time between the pull over and the breath demand, some 15 minutes, was excessive. The right to counsel, he submitted, should have been provided.

The Crown, on the other hand, submitted s.10(b) was not violated because the word "forthwith" is dependent upon what is going on during the period of time leading up to the formation of the reasonable suspicion and the making of the demand. The Crown contented the time between the formation of the reasonable suspicion and the making of the demand was brief.

"[The passage of time from the pull over to the administration of the ASD test] was fully and properly occupied with the investigation, forming the suspicion, readying the device and instructing the accused. There was simply no time in which counsel could have or should have been consulted."

"Forthwith" means "within a reasonable time having regard to the provision and circumstances of the case" and an ASD sample should "generally be administered as quickly as possible" allowing for such delay as necessary to

ready the equipment and instruct the suspect on what to do. The cases on the meaning of forthwith do not involve a calculation of the precise number of minutes but examine the passage of time in the context of what occurred. Only when the police officer is not in a position to require that a breath sample be provided forthwith, does the officer need to advise a driver about their right to counsel. And even if a cellular phone was available at the roadside, it is irrelevant if the officer is in a position to administer the ASD test forthwith. Individuals who can afford and choose to use cellular telephones do not have broader constitutional rights than those that don't.

"[T]he conversation ... between the formation of the reasonable suspicion and the issuance of the formal demand ... was no longer than reasonably necessary to enable the police officer to carry out his duties."

In this case, the judge noted that part of the time taken up between asking the accused to step into the police vehicle for the breath sample and the taking of the breath sample itself was preparing the instrument and describing what the device was used for, the possible results (pass, warn or fail), the consequences associated with each result, and the accused pleading with the officer to cut him a break. In holding the sample was taken forthwith and the accused was not entitled to speak to a lawyer Judge Frame stated:

> [The officer] formed a reasonable suspicion at approximately 9:40 pm that [the accused] had alcohol in his body. Up to that point, there was a reasonable period of investigation to determine if there was reasonable suspicion. The appropriate measure of time to consult counsel does not commence until a reasonable suspicion has been formed that the accused has alcohol in his body. [The officer] indicated to [the accused] that he required him to step into his police vehicle so he could administer a breath test as a result of that suspicion. [The accused] complied but occupied much of the time following the formation of that suspicion with a plea for leniency. [The officer] also occupied some of that time with explaining the workings of the AS Device. In my view the conversation which ensued between the formation of the reasonable suspicion and the issuance of the formal demand at 9:45 pm was a delay of five minutes and was no longer than reasonably necessary to enable the police officer to carry out his duties. Those duties included instructing [the accused] to get into the police vehicle and instructing him on how the breath test would proceed.
>
> Even if the breath demand was made informally at 9:40 pm when [the officer] advised [the accused] that he required him to get into his vehicle for the purposes of taking a breath test, then the seven minutes which followed before administering the breath test did not afford a realistic opportunity to consult with counsel given that the time was filled with [the accused] seeking a break and [the officer] advising [him] how the breath test would proceed. This is not a case of [the officer] wasting time with irrelevant matters or delay being incurred because of the lack of availability of an ASD in [the officer's] vehicle. The evil which is sought to be cured in the various cases put before me is simply not present in the case at bar. [paras. 29-30]

And further

> In my view, the investigation which ensued at roadside between 9:30 pm and 9:40 pm was a reasonable amount of time for [the officer] to conduct the investigation including his conversations with [the accused] about the consumption of alcohol and the use of mouthwash.
>
> To be perfectly clear, the passage of time from the pull over at 9:30 pm to the administration of the ASD test around 9:47 pm, and the events which occurred in that time, did not afford a realistic opportunity to consult with counsel. The time was fully and properly occupied with the investigation, forming the suspicion, readying the device and instructing the accused. There was simply no time in which counsel could have or should have been consulted. [references omitted, paras. 34-35]

The demand for the accused's breath sample into an ASD conformed with the statutory requirements of s.254(2) and therefore there was no unreasonable search and seizure nor was the accused entitled to exercise his right to obtain and instruct counsel without delay nor to be informed of that right prior to the ASD demand.

The accused's *Charter* application was dismissed.

Complete case available at www.provincialcourt.bc.ca

ACCUSED MUST HAVE STANDING TO SEEK REMEDY

R. v. Vi, 2008 BCPC 29

Police received an anonymous tip about a potential marihuana grow operation at a residence and started an investigation. A junior police officer made several attendances to the subject residence and trespassed on the property. A very senior police officer with considerable experience as a drug investigator assumed conduct of the file and disclosed to the judicial justice of the peace in the search warrant application the errors made by the junior officer. The experienced affiant officer then set out in the information all steps taken, independent of any information the junior officer may have provided, to support the application for the search warrant. The warrant was issued, the home searched, and a marihuana grow operation was discovered. The accused was arrested at another residence and was charged with unlawful production of marihuana and possession for the purpose of trafficking.

At trial in British Columbia Provincial Court the Crown objected to the accused cross-examining the affiant officer arguing he had no standing to bring such an application. Although the accused purchased the home for $130,000 cash and a black pickup truck belonging to him was seen in the driveway of the home, he did not actually live at, and infrequently visited, the subject property. The black pickup truck was registered to the accused at another address and his driver's licence also showed this other address as his residence. Unnamed neighbours also provided information to police about an unidentified Asian couple who were associated with the subject home but were hardly ever there.

Under s.24(2) a person can only seek a *Charter* remedy if their personal rights have been infringed. In search cases, the onus is on the accused to establish, on a balance of probabilities, a reasonable expectation of privacy and, thereby, standing. In this case, Judge Doherty found the accused did not have a reasonable expectation of privacy. He was not present at the time of the search nor was he a found-in. It was not clear that he had possession or control of the property, although he had keys to the subject property on his person when arrested. And even though he owned the property, it was not clear who, if anyone, was occupying it. Nor did he live there. The persons associated with the property were merely described as an Asian couple and there was no indication that the accused was one of those people.

Complete case available at www.provincialcourt.bc.ca

IN HOUSE ARREST LAWFUL

R. v. Vi, (ruling #2) 2008 BCPC 28

After executing a search warrant at a residence owned by the accused, police went to a different house where the accused lived at about 9:15 am. to find him and arrest him for the marihuana grow operation. They did not find him at his address and arranged for a member of the Citizens on Patrol (COP) to keep watch. An officer received notice from COP that the accused had returned, so he, along with another officer, returned to the residence intending to make the arrest. They did not have nor give consideration to obtaining a Feeney warrant. While explaining why police were at his doorstep, the accused invited the officer inside. The officer stepped inside the foyer, continued to explain why he was there, and arrested the accused.

During a *voire dire* in British Columbia Provincial Court the accused argued that the arrest was unlawful, breached the *Charter*, and was serious enough to warrant a remedy. He submitted there were no exigent circumstances, police should have refused the invitation to enter, informed him of the reasons why they were there, and told him of his options - to come with them immediately or, if he refused, police would obtain a Feeney warrant. He further contended that the intention of the police in having him step outside the sanctuary of his residence for the purpose of arresting him was encapsulated by a Feeney warrant.

Judge Doherty, however, disagreed. By inviting the police in, the accused consented to the officers' attendance inside. And even if evidence of informed consent was not compelling by inference or otherwise, the *Charter* breach was of a technical nature only and required no remedy.

Complete case available at www.provincialcourt.bc.ca

OFFICER LACKED SUFFICIENT GROUNDS FOR ASD TEST

R. v. Geraghty, 2008 BCPC 63

The accused was pulled over by police during a Christmas roadblock. She denied having any alcohol to drink and the officer could not smell any, either coming from the vehicle, her person, clothing, or from her mouth. But the officer noted her eyes appeared watery and she displayed slowness and diminished dexterity when asked to produce her driver's licence and registration. She succeeded only in locating her driver's licence. When asked to step out of her vehicle and walk to the curb, she appeared to steady herself on the door when closing it and her first step toward the curb appeared to be a misstep. And when asked again at the curb about her drinking, she replied she had one drink. The officer formed a reasonable suspicion that the accused had alcohol in her body when she was driving and made a roadside screening demand, which was refused.

At trial in British Columbia Provincial Court on a charge of refusing to provide a breath sample, the accused argued the officer did not have the necessary grounds to form a reasonable suspicion that she had alcohol in her body. The Crown, on the other hand, submitted that the officer's observations, taken cumulatively, afforded him a reasonable basis for suspecting the accused had alcohol in her body.

A demand for a breath sample pursuant to s. 254(2) is unlawful if the officer who makes it does not reasonably suspect that the person operating a motor vehicle "has alcohol in that person's body". In this case, Judge Woods concluded the officer did not, considered in the aggregate and context of other possible explanations, objectively have a reasonable suspicion. There was no reference to an odour of alcohol, even though the judge could not say a collection of other factors could never form the basis for a reasonable inference that there is alcohol in the body. Each of the rest of the observations could be consistent with the presence of alcohol in the body but they could also be consistent with other explanations as well, including strain, fatigue, infection, and recent weeping causing watery eyes, high heels or other precarious footwear on a wet road surface causing the misstep, and persons pulled over by the police can be anxious through the experience itself, causing them to sometimes fumble with documents when asked for them and showing nervousness. In acquitting the accused, Judge Woods stated:

> Absent evidence of the odour of alcohol or erratic driving or slurred speech or other observations of the kind recounted in cases like these, the aggregation together of the observations that [the officer] did make does not in my mind achieve critical mass. It does not amount to a sufficient foundation of concrete observations not otherwise explainable to justify [the officer] coming to a conclusion that [the accused] had alcohol in her body.
>
> Even [the accused's] admission that she had had one drink does not lead inexorably or necessarily to the formation of a reasonable conclusion that she had alcohol in her body. That drink could have been consumed long enough before that even if it was an alcoholic drink (which was not specifically addressed in the question or the answer) the alcohol could have cleared by the time [the accused] was pulled aside.
>
> While I do not believe that he acted in anything other than good faith, I believe that on the slender evidence of the observations he made, [the officer] rushed too quickly and in my view unreasonably to attribute to what he observed to the effects of alcohol.
>
> It was incumbent on him in these circumstances to give genuine consideration to other competing explanations as well as the explanation that there was alcohol in [the accused's] body before forming his suspicions. This is particularly so when some of the touchstone indicia, beginning with the odour of alcohol emanating from the accused's mouth and including as well erratic driving and slurred speech, did not form part of the equation.
>
> .....
>
> Here, there was no odour of alcohol, nor were there other touchstone indicia. In those circumstances, I am satisfied that in order to form a reasonable suspicion that there was alcohol in [the accused's] body, [the officer] would need to have observed more than he did. Inasmuch as the breath demand was not predicated on a reasonable suspicion that [the accused] had alcohol in her body, it was neither a valid nor a lawful demand. The Code criminalizes refusal to comply with lawful demands and because this demand was not lawful, I find [the accused] not guilty. [references omitted, paras. 32-37]

Complete case available at www.provincialcourt.bc.ca

COUNSEL OF CHOICE NOT BREACHED WHEN OFFICER GAVE OPTIONS

R. v. Semple, 2008 BCSC 155

A police officer received a complaint about a possible impaired driver at a McDonald's drive-thru, spotted the suspect vehicle, and followed it. He stopped the vehicle, noted a moderate smell of alcohol from the vehicle and observed the accused's speech was slightly slurred. The officer asked the accused to get out of the vehicle and walk to the back of it, where he determined the smell of alcohol was coming from the accused. The officer made some other observations related to balance and he formed the grounds necessary for the Approved Screening Device (ASD) demand. The accused failed and the officer believed his ability to operate a motor vehicle was impaired by alcohol. He read the 24 hour suspension from driving under the *Motor Vehicle Act,* gave the breathalyzer demand, and *Chartered* the accused.

The accused was transported back to the police station where he invoked his right to speak with counsel by indicating he wanted to speak to a lawyer of his choice. The officer called the lawyer's phone number, but there was no answer. So he asked the accused if he wanted to speak to any other lawyer, if he wanted to continue to wait, or if he wanted to speak to Legal Aid. The accused said he wanted to speak to Legal Aid. The officer then called Legal Aid, left a message, and when they called back the accused spoke to duty counsel. Once the call was concluded, the accused was taken to the breathalyser room where breath samples were taken.

At trial in British Columbia Provincial Court the judge found the ASD sample was taken forthwith, as the legislation (s.254(2) *Criminal Code*) required. He held there was no gap in time between the formulation of the suspicion and the reading of the ASD demand. Further, the trial judge found the accused's rights under s.10(b) had not been violated. He ruled the officer obtained the name of a lawyer from the accused, found a phone listing, and called the number. There was no answer, the officer told the accused this, and then provided three choices: continue to wait, call any other lawyer, or call Legal Aid. He chose to call Legal Aid and failed to establish a breach on his *Charter* rights. The certificate of analysis was admissible and the accused was convicted.

The accused appealed his conviction to the British Columbia Supreme Court arguing the trial judge erred in failing to find s.8 (ASD sample not taken forthwith) and s.10(b) (deprived of counsel; of choice) *Charter* breaches. But Justice McKinnon agreed with the trial judge and dismissed the appeal.

s.8: Unreasonable Search/Seizure

Section 254(2) contains an implicit requirement that the ASD demand be made "forthwith" and the burden is on the Crown to establish this on a balance of probabilities. In this case there was evidence from the officer inferring that the demand flowed immediately following formation of the suspicion. The officer formed his suspicion after the accused got out of the truck and walked to the back of it, which was followed immediately by the ASD demand. Justice McKinnon found the trial judge was entitled to conclude there was no delay.

s.10(b): Right to Counsel

Although the accused was given the opportunity to speak with duty counsel, he contended he was "foreclosed" from speaking with the lawyer of his choice, thus breaching his rights under s.10(b). By taking the initiative to call his chosen lawyer, the accused submitted that the officer "usurped" the accused's right to make his own contact and therefore the officer was obligated to make much more effort in arranging it.

Justice McKinnon noted that the right to counsel has been interpreted to include the right to counsel of one's choice. And that's just what the officer did. Once the officer made no contact, the initiative to contact counsel was then placed back to the accused. He stated:

> I do not read any of the cited cases to stand for the proposition that when police place a call for an accused, they then take on the role of "finder" of counsel, relieving the accused of any obligation in that regard. There may be circumstances where police "take charge" and exclude the accused from any meaningful input, but this is not one of those cases.

> At bar, the police placed the call to [the accused's lawyer of choice], got no answer (not surprisingly given the time of day), told the [accused] of this and invited him to consider other choices [call a different lawyer, legal aid, or wait]. The accused considered these choices and opted to call Legal Aid. He took the initiative as he was obliged to do. [references omitted, paras. 38-39]

The accused's appeal was dismissed.

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

FAILING TO KNOCK AT GARAGE DOOR A SERIOUS CHARTER BREACH: EVIDENCE EXCLUDED

R. v. Cao, 2008 BCSC 139

Six drug squad members attended at the accused's residence for the purpose of executing a search warrant authorized under the *Controlled Drugs and Substances Act*. Although police had conducted surveillance of the house on nine previous occasions prior to obtaining the search warrant (where no one nor any vehicles were seen), they did not watch the place for any length of time prior to their entry nor did they carry out a risk assessment. Police had identified no specific risks respecting the two story house, other than the concerns generally associated with marihuana grow operations, and had no specific concern about weapons, had no reason to believe anyone was in the home when the warrant was executed, and had no concerns about preserving the evidence.

Drug squad members approached the front door of the house with a battering ram, pounded on the front door and called out "police-search warrant". They abandoned entry by the front door and went to the garage door situated at the side of the property where they forced entry without further announcement, and entered with their guns drawn. About one to two minutes elapsed from the time police knocked at the front door and entered through the side door. They then kicked open the door leading from the garage into the house, again with guns drawn and without any further knock and announcement. Immediately after kicking in the door, the officers went into the laundry room where they found the accused, screamed commands at him, and pointed their guns at his head. He was handcuffed and arrested for production of marihuana. Police found a 704 plant marihuana grow operation in four rooms of the unfinished basement.

At trial in British Columbia Supreme Court on charges of production of and possessing marihuana for the purpose of trafficking, the accused argued the search warrant was executed in an unreasonable manner because the police did not properly announce their presence, did not provide a reasonable period of time for him to respond, and they entered with their guns drawn. In his view, the police summoned him to the front door, but abandoned that means of entry and entered through the garage door without any further announcement, thereby giving him insufficient time to react and answer their request. He submitted there were no exigent circumstances warranting a dynamic entry without proper notice, no specific danger associated to the residence, and no reason to suspect anyone was inside the house. By battering down the door and entering with guns drawn, the police aggravated the unreasonable entry. Thus, the accused maintained the evidence should be excluded under s.24(2).

The Crown, on the other hand, argued the police knocked and announced at the front door and waited for about two minutes, enough for the occupants to respond. Having received no response, police were entitled to presume entry had been denied and force their way in. Police must act quickly for their safety and the safety of any occupants for a number of reasons in suspected marihuana grow operations. It is normal to find weapons or traps, there is a risk that documentary evidence will be destroyed, and waiting longer may allow an accused to arm themselves or escape by another exit. The Crown also suggested that entry with guns drawn did not breach s.8 because the police need to protect

"The lawfulness of an entry to a residence pursuant to a valid search warrant depends upon the reasonableness of the manner of entry chosen by the police. Where there are no exigent circumstances justifying a dynamic entry ... the police are required to knock, announce their presence and their lawful purpose for entry, and allow a reasonable amount of time for a response by any occupants."

themselves from risks that may be present in a grow operation and it is reasonable that guns are drawn to clear the house.

Justice Bruce found in favour of the accused and ruled that the police violated his s.8 *Charter* rights. She first described the knock and announce rule as follows:

> The lawfulness of an entry to a residence pursuant to a valid search warrant depends upon the reasonableness of the manner of entry chosen by the police. Where there are no exigent circumstances justifying a dynamic entry, as in the circumstances of this case, the police are required to knock, announce their presence and their lawful purpose for entry, and allow a reasonable amount of time for a response by any occupants. This so called "knock and announce" rule is not a mere formality. This rule is necessary to ensure the personal safety of anyone inside the residence at the time of entry as well as the police. When the police batter down a door to secure entry to a residence unannounced with firearms drawn and ready to be discharged, it creates a high degree of risk to both the occupants and the police. This risk is substantially reduced when the occupants have time to prepare themselves for the entry rather than responding instinctively to an unknown and possibly dangerous intruder.
>
> .....
>
> A dynamic entry, where there is no prior announcement and request to enter, is only justified if there is a real threat of violent behaviour associated with the particular residence or a demonstrated risk that evidence could be destroyed. It is not sufficient to warrant a dynamic entry that the police identify the risks associated with marihuana grow operations in general. ..... [references omitted, paras. 25-27]

In this case there were no exigent circumstances warranting a dynamic entry. The police first sought entry through the front door, knocked and announced, but abandoned that entry point and chose to enter through the garage door where no further announcement was made before battering it in. Instead, they should have knocked and announced at the garage door as well. Justice Bruce described it this way:

> One of the underlying purposes of the "knock and announce" rule is to allow any occupants a reasonable period of time to permit entry to the police. In most cases, one or two minutes would clearly be sufficient time for an occupant to respond to a demand for entry. In this case, however, the police directed the occupant's attention to the front door and then surprised him by entering through the garage door. Whether or not I accept the accused's evidence that he was endeavouring to respond to the pounding on the front door, the police have to assume that when they knock and announce at the front door, that will be the door to which the occupants will direct their attention. Consequently, if the police abandon the front door for another entrance to the residence, they must at least knock at the second door and give a reasonable period of time for the occupant to respond. Absent these minimum standards, the entry is in effect a dynamic one, which surprises the occupant, without any evidence of extrinsic circumstances. [para. 31]

Justice Bruce concluded the police violated the "knock and announce" rule by failing "to alert the occupant to their demand for entry to the garage door and failed to provide a reasonable time for response before battering the door down and gaining entry violently." Furthermore, the s.8 violation was aggravated by the police drawing their weapons in the ready position when entering:

> Underlying the "knock and announce" rule is the personal safety of the police and the householder who may be placed in jeopardy when there is a violent intrusion into a private residence. Because there was no formal or informal risk assessment supporting the use of drawn weapons in this particular case, and no reasonable suspicion that anyone was inside the Residence, the abrupt and violent entry executed by the police went well beyond what was necessary in the circumstances. The actions of the police created a real risk of harm to an occupant by accidental shooting and to the police in terms of an aggressive response to the violent entry. In my view, a shocking entry without a prior "knock and announce", with guns drawn and ready to be discharged, and pointed at the accused's head, could have produced disastrous consequences. [para. 35]

As a result, Justice Bruce ruled the evidence inadmissible under s.24(2). Although it was non-conscriptive evidence and trial fairness would not be affected, the breaches were serious. She stated:

> Turning to the facts of this case, I find the violent entry executed by the police was unnecessary in all of the circumstances and clearly

created a danger for the accused and the police. Coupled with the high expectation of privacy accorded to persons in their homes, the police created an extremely dangerous situation by forcing entry without any regard to the particular circumstances before them. Moreover, this kind of violent and forceful entry with guns drawn appears to be standard practice for the Surrey R.C.M.P. I note here that neither pre-entry surveillance nor a risk assessment to determine the amount of force required for a safe entry is normal procedure.

The charges against the accused are serious and, if convicted, he could face heavy penalties. Further, it is well known that in the Lower Mainland the existence of marihuana grow operations in private residences is an ever increasing problem that in some municipalities has become epidemic. As a consequence, society's interest in bringing those charged with serious offences to justice is a significant factor in this case.

Balancing the relevant factors, I am satisfied the evidence should be excluded. Notwithstanding production of marihuana is a serious offence and the Crown will be unable to prove its case without the evidence secured by the entry to the Residence, to admit the evidence would bring the administration of justice into disrepute. The manner of entry employed by the police in this case potentially endangered lives without any exigent circumstances to warrant their actions. They acted without addressing their minds to any particular risks identified in regard to the subject Residence.

There were clear alternatives available to the police that did not involve a breach of the accused's rights under the Charter. As a consequence, there was an absence of good faith on the part of the police, not because the breach was deliberate, but because their actions were unreasonable. ...[I]t is inappropriate to condone the police failure to take the proper precautions to preserve the safety of all involved as well as the rights of the accused. Short cuts taken by the police that ignore constitutional rights should not be condoned .... [references omitted, paras. 37-40]

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

Note-able Quote

"Every man is guilty of all the good he didn't do." - Voltaire (1694 - 1778)

CURIOSITY SEARCH MISSES CONSTITUTIONAL MARK

R. v. Funk, 2008 BCSC 220

Shortly after 11:00 am several officers responded to a reported break and enter in progress with two suspects on scene. One of the responding officers slowly drove up the street looking into backyards for any suspicious activity when he observed a car in front of him make a u-turn. This immediately aroused his suspicion and he thought that the vehicle was related to the break and enter. The officer was familiar with the area and thought that unless a person lived on the street or was visiting someone, there was no reason to be there. He pulled the vehicle over and approached the passenger side, opening the unlocked passenger door and speaking to its driver. The officer told the accused he was under investigation for break and enter, asked for his driver's licence, and *Chartered* and warned him.

The officer noticed that the vehicle was fairly clean inside and there was a medium sized black bag on the back seat with a lunch bag on top. The officer was curious to know what was inside the black bag given his experience that those kinds of bags are used to transport break and enter tools and other types of objects, including stolen items. He believed the accused could easily be involved with the reported break and enter and could be carrying tools, weapons, laptops or stolen jewellery. He was also surprised the accused was overly calm, cooperative and did not seem to understand what was happening, when most people are usually nervous when dealing with police officers. After the accused could only provide the first name of the vehicle's owner, did not know where the owner lived, and did not appear to fit the vehicle style, he informed the accused he was also being detained for theft of the vehicle. Computer checks for the registered owner and the accused were negative—neither had a record or any conditions.

The officer, still suspicious and wanting to know what was in the black bag (to confirm there was nothing related to the break and enter, such as crowbars, razor blades, hammers, or bolt cutters—tools of the kind commonly used to break and enter), asked the accused if he could have a look inside, but the accused replied he would rather not have him look. The officer

then asked the accused to step out of the vehicle and noticed a silver pocketknife clipped on his jeans pocket. The officer took the knife, lifted the accused's shirt, and saw a black belt pouch labelled Gerber with another knife inside, which he also took. The accused was handcuffed, arrested for possession of a concealed weapon, and again *Chartered* and warned. The officer then went back to the vehicle, unzipped the black bag, and found a large quantity of drugs inside. The accused was arrested and re-*Chartered* for possession of a controlled substance for the purpose of trafficking.

At trial in British Columbia Supreme Court on 11 counts of possessing controlled substances for the purposes of trafficking and two counts of carrying a concealed weapon, the accused argued his rights under ss.8 and 9 of the *Charter* were breached and that there were not reasonable grounds for his arrest for carrying a concealed weapon.

Justice Loo first noted that a warrantless search is *prima facie* unreasonable and in this case the Crown needed to prove that the arrest was reasonable and authorized by law under s.495 of the *Criminal Code*, which allows a peace officer to arrest without warrant a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence. If the arrest was reasonable, then a search incidental to the arrest would also be reasonable.

The Search

The search in this case was incidental to neither an investigative detention nor arrest.

A search incidental to investigative detention can be undertaken where the officer believes on reasonable grounds that their safety, or that of others, is at risk. It does not exist as a matter of course nor can it be justified on the basis of a vague or non-existent safety concern or be premised upon hunches or mere intuition. Here, Justice Loo found the officer could not have believed on reasonable grounds that his own safety or the safety of others was at risk when he searched the black bag:

> [The accused] was handcuffed and in the back seat of a police vehicle. [The officer] did not have objective reasonable grounds for believing there were weapons in the bag. He had received no reports that the reported break and enter was an actual break and enter, or that there were any weapons involved in the reported break and enter. [para. 38]

As for a search incidental to arrest, a search is only justifiable if the purpose of the search is related to the purpose of the arrest, such as finding evidence related to the arrest. In this case, the accused was arrested for carrying a concealed weapon and therefore there must have been some reasonable prospect of securing evidence on that charge when the black bag was searched. But that is not what the officer was looking for. Rather, he wanted to satisfy his curiosity and know what was inside the bag and whether it was connected to the reported break and enter. Thus, the search was not truly incidental to the arrest or authorized by law.

The Arrest

The power to arrest requires that an arresting officer subjectively have reasonable grounds and that those grounds must be justifiable from an objective point of view, based on the totality of the circumstances. The police only need reasonable grounds and do not need to establish a *prima facie* case for conviction before making the arrest. But in this case, Justice Loo found the knives were neither a weapon nor concealed.

A weapon is defined in the *Criminal Code* as anything used, designed to be used, or intended for use in causing death or injury to any person, or for the purpose of threatening or intimidating any person. Justice Loo rejected Crown's submission that it could be reasonably inferred from the facts that the knives were intended to be used for self defence:

> There is no evidence upon which I can properly make that leap. Otherwise, any citizen seen walking down the street with a similar pocket knife clipped to his pocket or while wearing a Gerber pouch carrying a Gerber knife in the way in which the knives were intended to be carried and worn could be arrested without warrant for carrying a concealed weapon.
>
> [The officer] recognized the pocket knife because he has one like it. He can use it as a tool for example to cut a seat belt. However, he testified in cross-examination that he was "not interested in finding out why" [the accused] had it. He simply saw it as a weapon. [paras. 51-52]

Nor were the knives concealed—to be kept out of sight or notice. The pocketknife was clipped to a pocket and the Gerber knife was in a pouch attached to a belt, both as they were designed to be used. Justice Loo stated:

> The officer did not have to search [the accused] in order to find the knives. He saw the pocket knife when [the accuse] was getting out of the vehicle. He saw the Gerber pouch around [the accused's] belt when he lifted his shirt. In my view, the knives were not concealed. There is no evidence before me that the knives are weapons. [para. 49]

Thus, the officer did not have reasonable grounds to arrest for carrying a concealed weapon.

Justice Loo concluded that the accused's *Charter* rights were breached and the evidence obtained from the search was excluded.

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

REASONABLE INFERENCES SUPPORT GROUNDS FOR ARREST

R. v. Wan, 2008 BCSC 268

Two Crime Reduction Unit officers were on patrol in an unmarked unit when they observed a man who appeared to be waiting for someone at a street corner. He did not appear to be dressed for the inclement weather and was disheveled. A short time later they observed a Hyundai motor vehicle approach. The man got in the vehicle for about 30 seconds and then both the man and the vehicle left in different directions. A few minutes later the officers observed the same vehicle and saw a man approach. They passed the vehicle and an officer saw what appeared to be a black bag in the driver's lap. When they got their vehicle turned around, the Hyundai had left the scene. The officers inferred there had been a second encounter.

The officers followed the Hyundai thinking another transaction might take place. They called for assistance from another police officer, who pulled the vehicle over. The accused, who was driving the Hyundai, was arrested for "drug trafficking" and he was transported back to the police detachment.

Police recovered a wallet from the car that included the accused's British Columbia driver's licence, but did not find any drugs. A second search of the car located a hole cut in the floor of the vehicle under a flap of carpet. The officer walked back along the road from where the Hyundai was stopped and where the emergency equipment was turned on. A small clear baggy with heroin and cocaine was found about 60 metres behind the stopped vehicle.

At trial in British Columbia Supreme Court on charges of possessing cocaine and heroin for the purpose of trafficking, the accused argued, among other grounds, that the police breached his s.8 (unreasonable search) and s.9 (arbitrary detention) *Charter* rights. In his view, the police did not have reasonable grounds to detain and arrest him nor to search his vehicle. He submitted that his activities leading up to the pull over were consistent with innocuous or innocent purposes. The officers testified that in their experience, the behaviour they observed was consistent with a common form of drug distribution (a dial-a-dope operation).

A search incidental to arrest will be valid if the arrest is lawful. A lawful arrest requires a subjective belief based on grounds justifiable from an objective point of view. In this case Justice McEwan found the arrest and resultant search lawful, stating:

> Here, although the second "encounter" required an inference, it was a logical and reasonable inference, and the police officers, despite their relative inexperience, possessed the skills and knowledge necessary to reasonably interpret the activities they observed as grounds for arresting the accused.
>
> The arrest and search were predicated on subjectively reasonable and probable grounds, and on objectively justifiable circumstances. The Charter was not violated under s. 8 or s. 9. [paras. 18-19]

Justice McEwan was also satisfied that the accused was responsible for depositing the drugs on the road and he was convicted.

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

Note-able Quote

"Justice without force is powerless; force without justice is tyrannical." - Blaise Pascal

FAILURE TO PROVIDE REASONABLE OPPORTUNITY BREACHES *CHARTER*

R. v. Smith, 2008 ONCA 127

Three masked men broke into a residence and began to assault the homeowner, who was able to flee the scene and call the police. In the meantime the perpetrators left the home in a vehicle and an officer tried to stop it, not knowing it was connected to the crime. After a short police chase, during which items taken from the home were thrown from the vehicle, the vehicle was stopped and the accused, along with his two companions, were detained. The accused was arrested for dangerous driving and the vehicle was searched at the scene in which a quantity of marijuana was found. As a result, the accused's companions were arrested for possession of drugs.

The police soon connected the home invasion with the vehicle and the men were taken back to the police station, but, at that time, the accused was only under arrest for dangerous driving. Although guns were involved in the home invasion police did not find any. The accused had been informed of his right to counsel upon arrest and indicated a desire to speak to his lawyer on two occasions shortly thereafter. The accused became aggressive with the investigating officers and he was returned to his cell where he again asked to speak to his lawyer. He was told he would not be allowed to make any calls at that time. The police were concerned he might contact someone who would pick up the missing gun and for "officer safety", because he had become aggressive.

About five hours after the arrest the investigating officers decided to charge the accused in relation to the home invasion, but he was not told of this change in circumstances until several hours later. In the meantime, seven hours after the arrest, one of the accused's companions was questioned about the location of the firearm. He refused to tell the police anything and was returned to his cell where he spoke to the accused about the questioning and made incriminating remarks. While the accused's responses were somewhat equivocal, they could be interpreted as implicating him in the home invasion. This conversation was overheard by one of the investigating officers who took notes of it. The police again spoke to the accused and told him that he was being charged with robbery and firearms offences, but did not attempt to question him about the offences. Then, more than nine hours after his arrest, the accused was allowed to use the telephone.

At trial in the Ontario Court of Justice the judge admitted the statements made by the accused and his companion to each other in cells. In her view, the accused's rights under s.7 of the *Charter* were not breached. She found that the conversation in cells was not elicited by the police and rejected the notion that questioning the accused's companion and then returning him to cells was a ploy to try and get the men to talk about the robbery. The judge also noted that the men had both been told that areas of the police station were under surveillance. The accused was convicted of several offences including break enter and commit theft, masked with intent, and robbery while armed with firearm.

The accused appealed to the Ontario Court of Appeal arguing, in part, that his rights under s.10(b) of the *Charter* were breached and the statements should be excluded on that basis. In holding the accused's right to counsel was violated, Justice Rosenberg, for the unanimous court, stated:

> In my view, the [accused's] right to counsel as guaranteed by s. 10(b) of the Charter was infringed. [T]he Supreme Court of Canada held that s. 10(b) imposes at least two duties on the police in addition to the duty to inform the detainee of the right to counsel. First, the police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay. On the trial judge's findings, the police did not carry out this duty. She rejected the explanation that it was reasonable to withhold access to counsel because of the ongoing investigation. Although that finding was made expressly in relation to the co-accused..., the [accused's] circumstances would not lead to a different result. [reference omitted, para. 17]

"s.10(b) imposes at least two duties on the police in addition to the duty to inform the detainee of the right to counsel. First, the police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay."

In so far as the accused also argued that the police failed to cease questioning or otherwise attempting to elicit evidence from him until he had a reasonable opportunity to retain and instruct counsel, Justice Rosenberg ruled there had been no elicitation. He stated:

> The questioning of the co-accused ... was done in good faith by the police in an attempt to locate a dangerous weapon and was not a ploy. In those circumstances, although the police unquestionably hoped that [the co-accused] and the [accused] might talk, at least about the weapon, it cannot be said that the conduct of the police in placing the two suspects in adjoining cells and deciding to attempt to overhear the conversation was the functional equivalent of an interrogation. There was no special relationship between the police and [the co-accused] and the [accused]. Throughout, the [accused] and [his co-accused] had an accurate perception of the situation, knowing that they were having a conversation in a jail after being warned that they were under surveillance. ... [para. 21]

Thus, when police overheard the jail cell conversation they did not breach their duty to refrain from trying to elicit incriminating information from the accused before affording him the opportunity to consult counsel .

Exclusion of Evidence

By failing to provide a reasonable opportunity to contact counsel, the jail cell conversation was "obtained in a manner" that breached the accused's s.10(b) rights. The infringement or denial of the right preceded, or occurred in the course of, the obtaining of the evidence. It was not necessary to establish that the evidence would not have been obtained but for the violation of the *Charter*. Here, there was a very close temporal connection between the violation and the obtaining of the evidence. The violation of the s.10(b) right was a continuing one, as the accused had repeatedly asserted his right to counsel.

Trial fairness though, would not be affected by the admission of the evidence. The accused was not compelled or conscripted to incriminate himself. Police conduct was not a ploy, the accused was aware that he was under surveillance, he freely volunteered his remarks to someone he knew and who was not a police agent, and the police had not attempted to elicit evidence from the accused by questioning him prior to his conversation with his co-accused.

The breach, however, was serious. Although mitigated somewhat because the conversation took place in a cellblock where there was a reduced expectation of privacy and he volunteered these statements, the accused asserted his right to counsel repeatedly. The purpose of the right to counsel is to give the detainee an opportunity to obtain information as to how to exercise the right to silence and it was reasonable to assume that competent counsel would have advised the accused that he should not speak to other prisoners, even his companion. Justice Rosenberg also noted:

> The violation of the [accused's] right to counsel was also not an isolated one. In addition to the s. 10(b) violation, the police failed to comply with their duty under s. 10(a) to inform the [accused] promptly of the reasons for his detention. The police had decided to also charge the [accused] in relation to the home invasion by at least 9:05 a.m., but they did not inform the [accused] of the true nature of his jeopardy until 11:45 a.m., after his conversation with [his co-accused]. [para. 32]

Although the offences were serious, the Ontario Court of Appeal found the violation in this case "strikes at core values underlying the administration of justice: the right to advice from counsel within a reasonable time so as to exercise the right to silence with knowledge of one's real jeopardy." If the evidence were admitted, the administration of justice would be brought into greater disrepute than if were excluded. Accordingly, the appeal from conviction for the offences relating to the home invasion were set aside and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

Right to Silence

"Continued police questioning after the suspect has received legal advice does not offend s.7 of the Charter unless it is overbearing to the point where it overrides the suspect's right to choose whether to answer or not or deprives him of an operating mind." - Alberta Court of Appeal Justice Conrad, *R. v. McKinnon*, 2007 ABCA 382 at para. 139, references omitted.

HIGH STANDARD OF PROOF REJECTED FOR EVIDENCE OF HIGH RELIABILITY

R. v. Colson, 2008 ONCA 21

The accused had been convicted of sexual assault, forcible confinement and assaulting police and served a four-year and five-month term of imprisonment in the Special Handling Unit of the Quebec Penitentiary. After his release he planned to move to Toronto to reside with relatives. Police contacted him prior to his release and met him at the bus terminal upon his arrival in Toronto where he was taken to police headquarters by detectives supervising high-risk offenders upon their release from prison. He was interviewed and subsequently entered into a recognizance under s.810.2 of the *Criminal Code* with conditions that he attend for counselling, therapy or treatment as directed, and he enter into a program of regular polygraph examinations for the purpose of monitoring and managing his sexual behaviour.

The accused complied with the conditions and developed a cordial relationship with the detectives over the following months. But he had failed the polygraph testing. The police then received a complaint from a woman that the accused sexually assaulted her. Although the detectives believed they did not have reasonable grounds to arrest him, they nonetheless interviewed the accused on videotape. During this lengthy interview the accused made statements and voluntarily provided a saliva sample.

About six months later a woman was murdered in an office building attached to the building where the other woman alleged she had been sexually assaulted by the accused. DNA samples (semen) taken from the murder victim's body were found to be similar to the DNA sample taken from the saliva earlier provided by the accused. He was arrested and charged with first-degree murder. A further blood sample pursuant to a *Criminal Code* DNA warrant was obtained while the accused was in custody and this sample matched as well.

At trial in the Ontario Superior Court of Justice a jury convicted the accused after the judge ruled the DNA evidence admissible. In the judge's view, the accused was well aware of the reasons for the request of his saliva and the potential uses for the sample and found he voluntarily consented to providing it. The accused had neither been physically or psychologically detained when he gave it. Nor was the relationship between the accused and the police based on oppression, fear or coercion, but rather was "one based upon cordiality and informality". The judge concluded the accused's rights were not infringed during the course of the interview and, applying the balance of probabilities standard, found he gave an informed, express and voluntary consent to the taking of the saliva sample.

The accused appealed his conviction to the Ontario Court of Appeal arguing the saliva sample, and its results, was inadmissible under the common law. He submitted that the trial judge failed to apply the appropriate standard of proof in determining whether a proper waiver, in the form of a voluntary and informed consent, had been provided. Rather than using a balance of probabilities standard for determining waiver (like consent seizures under the *Charter*), the accused contended that a voluntary and informed consent to the giving of a bodily sample should be treated no differently than a statement is under the common law confessions rule. Under the common law confessions rule, the criminal standard of proof beyond a reasonable doubt applies. He suggested that since statements and body samples are both "conscriptive" forms of evidence and their admission when illegally obtained would tend to undermine the overarching principles of trial fairness and the right to protection against self-incrimination, the higher standard of proof is required.

Justice Blair, writing the judgment for the unanimous court, rejected the accused's position. First, the common law with respect to the giving of bodily samples does not parallel the common law confessions rule in terms of the standard of proof. Second, there are significant differences between statements and body samples. Reliability remains one of the essential underpinnings in the evidentiary exclusion / admission exercise under the common law confessions rule. And finally, there was no policy reason or justification for extending the common law rule to body samples in order to accommodate the process concerns that underlie the modern emphasis on trial fairness.

Confessions rule

As well as trial fairness and protection against self-incrimination, the common law confessions rule remains concerned with reliability as an underlying rationale because a confession made to a person in authority that is involuntary is often unreliable. Since it is recognized that involuntary statements are more likely to be unreliable, the confessions rule requires a standard of proof beyond a reasonable doubt before it may be admitted in evidence to avoid miscarriages of justice. Unlike the making of a statement, which gives rise to serious "reliability" concerns, the taking of bodily samples gives rise to very few worries about "reliability", especially in the DNA context. "Reliability is not a concern with respect to bodily samples, particularly DNA results taken from a bodily sample of saliva," said Justice Blair. "Indeed, reliability is the hallmark of properly introduced DNA testing. Thus, there remains an important distinction between the admissibility of DNA results taken from a bodily saliva sample and a confession, notwithstanding that both are considered to be conscriptive evidence under s.24(2) of the *Charter*." He further stated:

> Statements given to persons in authority are notoriously unreliable if their voluntariness, in the sense of their freedom from inducement or threat, is not assured. Different considerations arise with respect to the voluntariness of a waiver or consent to provide bodily samples, however, and with respect to the exclusion of test results emanating from those samples, which are not fraught with the same frailties. [para. 40]

Further the confessions rule has been confined to statements and has not been extended to the taking of bodily samples. Thus, Justice Blair found there was binding authority that "bodily samples and the results of physical tests are not to be treated in the same fashion as statements because the rationale behind the confessions rule only applies to statements."

Policy

Finally, the Court saw no policy reason or justification for extending the standard of proof under the common law confessions rule to the common law treatment of the taking of bodily samples because of the differing reliability concerns and the "well-developed *Charter* landscape for determining whether improperly obtained evidence should or should not be excluded." Nor would the Court create a new common law right:

> At a more general level, however, I see no justification for creating a new common law right - infused, the argument goes, by the Charter tool of equating bodily samples and statements as "conscriptive evidence" and by the now Charter-guaranteed fundamental principles of trial fairness and protection against self-incrimination - that would provide greater protection to an accused than the Charter safeguards he agrees have been properly applied in the circumstances of this case. The [accused] would derive greater protection because, under the proposed common law principle, the bodily samples would be automatically excluded from evidence unless the Crown could demonstrate a voluntary and informed waiver or consent beyond a reasonable doubt. Under the Charter, on the other hand, the [consent waiver doctrine] need only be established by the Crown on a balance of probabilities. In short, the [accused] invokes the Charter, and Charter-related values, to push the common law to the desired point, then invokes the common law (devoid of the Charter) to achieve the more advantageous legal result that he seeks. This approach makes no sense, particularly where ... there is no need for it, given the well-developed Charter jurisprudence respecting trial fairness and its included values in the context of improperly obtained evidence. [para. 38]

Justice Blair ruled that the consent test, including the balance of probabilities standard, adequately addressed the core concerns of the criminal law. He stated:

> DNA samples, for example, do not bring with them the unease associated with potential wrongful convictions, whereas false confessions do and the common law confessions rule reflects that danger. [The Wills consent test] also directs trial judges to be alert to issues going to abuse of process and interference with individual autonomy (for example, police oppression, coercion or other external conduct negating freedom of choice). On the other side of the scale, Wills balances the need of the state to investigate and solve crimes, a factor that speaks in favour of the less stringent standard of proof.

> ... The underlying criminal law policy concerns - wrongful convictions, abuse of police power and coerced self-incrimination, and respect for human choice and autonomy - are all adequately preserved and accommodated through the Charter regime. A new common law regime is not required. [paras. 42-43]

The Court held that the trial judge applied the correct standard of proof in determining that the accused voluntarily consented to providing his saliva sample to the police. The sample and the DNA results flowing from it were admissible. The DNA results emanating from the second bodily sample provided pursuant to the *Criminal Code* DNA warrant were also properly admitted. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

CHILD SEATBELT OFFENCE ONE OF STRICT LIABILITY

R. v. Kanda, 2008 ONCA 22

A traffic officer, parked at a four-way stop, saw a vehicle stop at the intersection. There were three people in the vehicle - a male driver (the accused), a child in the front passenger seat, and another child in a rear seat sitting forward, leaning against the back of the driver's seat without a seat belt on. The vehicle was pulled over and a ticket for violating s.106(6) of Ontario's *Highway Traffic Act* (*HTA*) was issued. This section creates an offence for a person to drive a motor vehicle on a highway in which there is a passenger under 16 years of age not wearing their seatbelt.

At trial before a Justice of the Peace the accused testified he had ensured that both his sons were wearing their seat belts when they left the family home and that he was not aware until he was pulled over and was informed by the officer the boy in the back seat had unfastened his seat belt. The JP determined that s.106(6) was an absolute liability offence and therefore a due diligence defence was not available. The accused was convicted.

On appeal to the Ontario Court of Justice, the appeal judge concluded that s.106(6) was not an absolute liability offence but rather one of strict liability. As a result, the matter was referred back to the JP to determine whether the accused was entitled to advance a due diligence defence. The Crown then appealed to the Ontario Court of Appeal to determine whether s.106(6) was a strict liability or an absolute liability offence.

Justice MacPherson, authoring the opinion of the Court, first outlined the three types of offences:

1. *Mens rea* (full liability) offences consist of some positive state of mind such as intent, knowledge, or recklessness which must be proven by the prosecution either as an inference from the nature of the act committed or by additional evidence. Offences which are criminal generally fall under this category.
2. Strict liability offences do not require proof of *mens rea*—the doing of the prohibited act *prima facie* imports the offence. However, an accused may avoid liability by advancing a due diligence defence, proving that all reasonable care was taken to avoid the particular event in the circumstances, or the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent. Public welfare offences presumptively fall into this category, unless words such as "wilfully", "with intent", "knowingly", or "intentionally" are contained in the statutory provision creating the offences thereby rendering them *mens rea* offences.
3. Absolute liability offences do not require proof of *mens rea*, but unlike a strict liability offence, it is not open to an accused to exonerate themselves by showing they were free of fault.

Section s.106(6) of the *HTA* is a public welfare offence making drivers responsible for ensuring that all passengers under 16 years of age use seat belts. It assures the safety of vulnerable youthful passengers who cannot be relied upon to take responsibility for their own safety. In deciding what category of offence a provision should be classified as, a court will consider four factors: the overall regulatory pattern, the subject matter, the penalty, and the precision of the language used.

Although the overall regulatory pattern was neutral is assessing whether s.106(6) was an offence of strict liability and the penalty (a modest fine without

fear of imprisonment) was consistent with an absolute liability offence, the subject matter and precision of the language used supported a strict liability offence. With respect to the subject matter, Justice MacPherson stated:

> In my view, the subject matter of s. 106(6) of the HTA supports a classification of the offence as strict liability. This classification strikes an appropriate balance between encouraging drivers to be vigilant about the safety of child passengers in their vehicles and not punishing those who exercise due diligence with respect to children's seat belts. [para. 32]

And further:

> [T]he classification of strict liability strikes an appropriate balance between encouraging drivers to be vigilant about the safety of child passengers in their vehicles and not punishing those who exercise due diligence with respect to children's seat belts. [para. 44]

Regarding the language used, he found that even though the subsection used the triggering language "no person shall", it did not automatically make it one of absolute liability. Other provisions using such language and found to be absolute liability offences proscribed conduct resulting directly from the person's own action. Section 106(6), on the other hand, dealt with a situation in which another person (the child) was potentially involved in creating the violation. An accused should be able to raise a defence of due diligence or reasonable care for an offence of failing to meet a standard in respect of another person. Finally, s. 106(6) of the *HTA* does not expressly exclude the defence of due diligence. Thus, a person caught driving a car in Ontario containing a child who is not wearing a seat belt can raise a defence of due diligence.

The appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

ARREST UNLAWFUL: OBJECTIVE GROUNDS MISSING

R. v. Fugman & Williamson, 2008 BCPC 70

An undercover police officer was given a telephone number of a possible dial-a-dope operation, but was not told the source of this telephone number or of the belief of the person from whom she got it. She called the number and an unknown male answered. She provided a false name, tried to explain how she got the number, described what she looked like, said she had money, and agreed to meet in 10 minutes at a restaurant. But there was no discussion about drugs.

The officer, dressed like a street level drug user, was dropped off in the area, but no one was there. About five minutes later a car drove into the lane nearby and stopped. When the passenger waved her over she walked to the passenger-side window, where the passenger was speaking on is cell-phone. He told the officer to, "Get in the back." She refused several times to get in the car, despite his insistence, and asked, "Have you got the stuff?" During the conversation she noted a large quantity of cash on the console of the car. He said, "Get in and we'll talk about it." It was then that the officer concluded the accuseds would not deal with her on the street so she signalled the cover team to move in. Evidence was found and the accuseds were both charged with possessing cocaine and heroin for the purpose of trafficking.

At trial in British Columbia Provincial Court the accuseds argued the police did not have the necessary grounds to arrest them. The officer testified she made the buy signal to arrest the men as dial-a-dope dealers because about 10 minutes had elapsed (which was consistent with the phone conversation and the sort of turnaround that often occurs in dial-a-dope cases). Furthermore, in the officer's experience there is often talk about where the person calling got the telephone number from, vehicles are often involved and show up, two people are involved 60 to 70 percent of the time, it is becoming more common for drug traffickers to ask the purchaser to get in, there was money on the console, and large quantities of cash are often associated with drug dealing.

An arrest will be lawful under s.495 of the *Criminal Code* if the police have reasonable grounds to make it. This imports both a subjective (what the officer believed) and objective (whether a reasonable person in the position of the officer would have the same belief) elements. Here, the officer said she had reasonable grounds to believe the accuseds would be in possession of drugs for the purpose of trafficking and were, therefore, about to commit trafficking.

The trial judge found the police officer had the necessary subjective grounds.

However, he ruled the objective grounds were lacking and the arrest was "precipitous". He noted the telephone number given to the officer was a "possible" dial-a-dope number, which means less than likely and even improbable. The telephone call mentioned no drugs, but only money. It was possibly a telephone call related to a dial-a-dope transaction, but could have been about some other legitimate transaction. Although the judge acknowledged that the whole tone of the call seemed to be rather sinister, he noted there were other possibilities, like the purchase of stolen property or an illegal money loan, and with the limited information in the call there was not enough to conclude that this was a dial-a-dope transaction. As well, the officer looked like a user and the type of person who may attract drug traffickers, but she also looked like a low-level prostitute, which could have been another reason for the men to approach her.

Other than the 10-minute time frame matching what was discussed in the phone call (although it could have been a coincidence), there was nothing else linking the car to the phone call. No one said anything, such as "You're on time" or "You're right where we told you to be" or "I'm sorry I'm late," no one confirmed or refuted the description that was given and discussed in the telephone call confirming that she was the right person or the fact that she might look different, and there was nothing else confirming the details about money nor any further discussion about it. The presence of the cash, although perhaps symptomatic of drug trafficking, could have been there for other illegal or legitimate reasons. As for the 60 to 70 percent statistic provided that dial-a-dopers use two individuals in a car, it would also not be unusual to see two young men riding around in a car together not involved at all in any such transaction.

As a result, the trial judge concluded that the officer did not have the necessary objective grounds to justify an arrest under s.495. He did, however, note she had grounds to investigate further, or have others do that on her behalf, and perhaps an investigative detention of the two accused may have been justified, but not the arrest.

Complete case available at www.provincialcourt.bc.ca

TRAFFIC STOP A RUSE TO FURTHER DRUG INVESTIGATION: EVIDENCE EXCLUDED

R. v. Lauriente et al, 2008 BCSC 187

Police received a Crimestoppers tip about a five-acre property and launched an investigation. As part of the investigation the accused Lauriente was stopped a few days prior to the obtaining of the search warrant where a significant amount of information relevant to the investigation was gathered. The investigating officer asked a patrol officer to stop the accused for speeding, and while stopped, she surreptitiously took his photograph to be used for the surveillance portion of the investigation. As well, the patrol officer obtained a great deal of evidence which provided further information for obtaining the search warrant, such as where the accused lived and that he was the only person who drove the sport utility vehicle which had been observed at the property several times.

The accused Lauriente was arrested in a vehicle as he left the residence while the officers were waiting for the search warrant to be granted. A search warrant under the *Controlled Drugs and Substances Act* was obtained and executed at a residence, two outbuildings, and three vehicles observed on the property. The accused Catalano was found amongst the plants in the larger outbuilding. Both men were charged with production of marihuana and possession for the purpose of trafficking.

At trial in British Columbia Supreme Court the accused Lauriente argued the search and his arrest violated several of his *Charter* rights. Among those rights allegedly breached, he submitted, were two s.9 breaches. First, he contended the police arbitrarily detained him when they pulled him over for the purpose of the traffic stop and second, that the police lacked reasonable grounds to arrest him. Furthermore, he maintained that his right under s.10(a) was also breached because he was not informed of the actual reason for the stop.

The Traffic Stop

With respect to the vehicle stop, the investigating officer testified she "orchestrated" it because she

wished to further the drug investigation. She claimed she observed the accused going approximately 95 km/h in a 70 km/h zone, but there was no evidence as to how she could reliably know that he was going 95 km/h nor was a violation ticket written. In reviewing the evidence, Justice Koenigsberg found the circumstances of the stop took it outside a lawful dual-purpose stop. A permissible dual purpose traffic stop is one where the police have a legitimate traffic purpose for stopping a vehicle, while at the same time are pursuing a non-traffic related investigation (such as a drugs). As long as the traffic inquiries are legitimate the police can use the information from those enquiries to pursue the other non-traffic related investigation. In this regard, the Court stated:

> Here, certainly, the lawful purpose of detention of an individual for speeding is at the very least on shaky ground. The evidence of speeding in the mind of the constable who stopped [the accused] was not sufficiently solid to support issuing a ticket. Thus, the most reasonable inference is that the only real purpose for stopping [the accused] was to obtain evidence to further the investigation of a marihuana grow operation. [The officer who pulled the accused over] did not stop [him] for a Motor Vehicle Act... violation to ensure public safety. He stopped him to provide information for an investigation. ...
>
> Here, there cannot reasonably be found to be a lawful purpose, that is a purpose related specifically to the Motor Vehicle Act concern for public safety, in the stopping of [the accused] for allegedly speeding when no ticket was even issued. In my view, this stop for speeding was a ruse for obtaining evidence to be used against [the accused]. It was therefore a clear breach of his s. 9 Charter rights. [references omitted, paras. 39-40]

And further, in her s.24(2) analysis, Justice Koenigsberg had this to say about the stop:

> The second [Charter breach found], is the stopping of [the accused] in order to obtain information for the investigation. Again, I do not find bad faith in this particular instance. I do not find that [the investigating officer] fabricated that [the accused] was speeding. There was simply no evidence of the reliability of her assertion that he was speeding and, further, he was not given a ticket. It is a relatively fine line between a dual purpose stop which is permissible, that is a stop in which there is a clear reason to detain an individual for an infraction of the law, and a ruse. Here I found on the totality of the circumstances before the Court that, in fact, the stop was a ruse and the detention of [the accused] was not for the purpose of public safety but, rather, to continue and assist in the investigation of the suspected grow operation. In these circumstances, in my view, this was a serious breach of [the accused'] s. 9 Charter rights. [para. 59]

Justice Koenigsberg also found the accused's s. 10(a) right was breached because at no time was he advised that the reason for the stop was for investigative purposes related to the possibility of a grow-op. "It is no surprise that [the accused] was not advised of the reason for the stop, but that in no way takes away from the duty of a police officer to advise a person who is detained of the actual reason for the detainment," she said.

The Arrest

Justice Koenigsberg disagreed with the accused that the police did not have reasonable grounds to arrest him prior to applying for and obtaining the search warrant. He was observed leaving the residence a few hours before the search warrant was applied for and police anticipated they would obtain the warrant and would enter and search the property within hours. Before the accused was arrested the investigating officer knew the following:

- the Crimestoppers tip was almost completely confirmed and named the accused as the owner of the property, which was confirmed by investigation;
- his car and person were observed at the residence and on the grounds of the residence, including around the out-buildings;
- he had been seen in the residence;
- he was the person named on the hydro billing for the residence;
- the odour of growing marihuana was detected around one or more of the outbuildings including in the area where the accused had been observed;
- and the hydro readings were considered high for the relevant period when the accused was the named person on the billing.

All of these factors, in Justice Koenigsberg's view, gave the police reasonable grounds to arrest the

accused prior to obtaining the warrant. Thus the accused's warrantless arrest did not breach s.9.

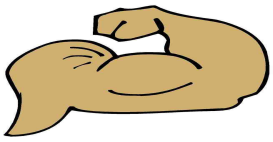
Exclusion of Evidence

Having found a number of *Charter* breaches, including issues respecting the information to obtain the search warrant and breaches against the accused Catalano's rights, the Court held that the actions of the police demonstrated "evidence of the general lack of attention to fundamental *Charter* rights." Even though the grow operation was non-conscriptive evidence, the cumulative effect of the breaches was serious and the administration of justice would be brought into disrepute if it was admitted. Thus, the evidence was excluded and the accuseds were acquitted.

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

LOSE FAT AND GET BIGGER

Insp. Kelly Keith, Atlantic Police Academy



One of the most common questions a personal trainer gets is " How do I lose fat and get bigger?"

1) You have to lift heavy weights - light weights will not do the trick.
2) You need to stick to the basic exercises of squats, lunges, bench press, rows, pull-ups, military press, clean and jerk, and dead lifts.
3) You must change up your routine every 4 to 6 weeks, keep your repetitions low (6-8 range) and your weight heavy.
4) Your body needs water, and lots of it, to perform optimally. Drink at least 10 to 12 glasses of water throughout the day and if you drink coffee, drink an extra glass of water for every cup of coffee you drink.
5) You cannot achieve your goal unless you eat enough calories to grow. There is no point in getting up and working out without first eating. If your goal is to simply lose weight this may be a good strategy. However, if you also want to get big, you must feed muscles for optimal performance. Eating six meals per day (every 3 hours) keeps your metabolism running optimally and will burn fat throughout the day.
6) If you are making a choice between low fat and low calories, always choose low calories. But keep in mind that you need to eat enough calories to sustain muscle growth. Low fat may mean it is filled with sugar. Generally, keep your food choices to the outside of the supermarket and try to stay away from processed food. Eating to get big and lose fat takes fresh food, costs a little more, and takes preparation.
7) An average person cannot lose more than 1 to 1 ½ pounds of fat per week without sacrificing lean muscle tissue or intra cellular water. Ensure you have reasonable goals and reward yourself each time you achieve a short-term goal.
8) Your metabolism is the slowest in the evening. You need to eat, but this is when you want to increase protein consumption and watch your snacks.
9) Muscles build while we rest. If you do not get enough rest, you simply will not get big.

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

LEGALLY SPEAKING:

Negligent Investigation

"I conclude that police are not immune from liability under the Canadian law of negligence, that the police owe a duty of care in negligence to suspects being investigated, and that their conduct during the course of an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted....The law of negligence does not demand a perfect investigation. It requires only that police conducting an investigation act reasonably. When police fail to meet the standard of reasonableness, they may be accountable through negligence law for harm resulting to a suspect." - Supreme Court of Canada Chief Justice McLachlin, *Hill. v. Hamilton-Wentworth Regional Police*, 2007 SCC 41 at para. 3

SPEAK AT YOUR OWN RISK

R. v. Meyers, 2008 NLCA 13

Police acquired warrants and obtained wiretap evidence as part of an extensive investigation, code named Operation Batman, regarding drug trafficking and the movement of marihuana from British Columbia to Newfoundland. Various members of the alleged drug conspiracy were identified. However, there was one person named Keith, who had not been identified from the wiretaps. The accused, who was in custody on another unrelated charge, was suspected of being "Keith". The lead investigator in Operation Batman learned, by chance, the accused was in custody and spoke to him in cells to determine if his voice matched the voice of Keith on the wiretaps, which it did. Although the accused had been advised of his rights under s.10(b) of the *Charter* in respect to the charge for which he was detained, this advice was not repeated before the investigator spoke to him for voice identification purposes.

The accused was granted bail on the charge against him, but when he returned to police headquarters eight days later to sign in as a condition of bail, he was arrested on a warrant for the trafficking charges. He was cautioned and advised of his right to a lawyer by the arresting officer and later was taken for administrative processing—the collection of personal data, fingerprinting and photography. Prior to processing, he was again cautioned and given his *Charter* rights. He spoke to a lawyer, declined to give a statement, and again the Batman investigator was able to confirm he was the Keith on the intercepts by having another discussion with him, again comparing the voice he heard on a wiretap with the accused's voice.

At trial in Newfoundland Supreme Court a *voir dire* was held to determine whether the voice identification evidence should be excluded because of breaches to the accused's right to silence (s.7 *Charter*) and right to counsel (s.10(b) *Charter*). The trial judge excluded the evidence of the discussion between the investigator and the accused when he was in the lockup on the unrelated charges because no s.10(b) *Charter* rights to a lawyer were given by the Batman investigator. However, the second conversation during the accused's processing was admissible. The investigator had cautioned the accused and given him his *Charter* rights to a lawyer, which he exercised. The accused was convicted by a jury of conspiracy to traffic and trafficking in marijuana. He was sentenced to eighteen months imprisonment followed by probation for three years.

The accused then appealed to the Newfoundland Court of Appeal arguing, among other grounds, that the voice evidence ruled admissible by the trial judge should have been excluded and also that his arrest was invalid because of the *Charter* violations.

s.7 Charter: Right to Silence

Section 7 of the *Charter* guarantees the right to silence and preserves the right of a detained individual to meaningfully choose whether to speak to the authorities or to remain silent. It also extends to exclude tricks which would effectively deprive the suspect of this choice. This principle is consistent with the common law right to silence which reflects the general principle that, absent statutory or other legal compulsion, no one is obligated to provide information to the police or respond to questioning. Section 7 does not, however, guarantee an absolute right to silence, but instead offers an objective approach subject to limits. These limits seek to achieve a balance between the right of the individual (choosing whether to speak to the authorities) and those of the state in effective law enforcement (society's interest in uncovering the truth in crime investigations).

In this case, however, the inculpatory statement was not intended to be used as evidence for its content. The conversation could not be characterized as akin to an interrogation. In other words, what the accused said was irrelevant. Rather, the investigator was only interested in the sound of the accused's voice. The voice evidence was evidence of identification and admitted for that purpose. And the voice evidence fell within the least serious end of the identification evidence spectrum, which runs from penetration into or removal of a substance from the body (such as DNA sampling), through the taking of evidence which, while distasteful, is insubstantial, of short duration and leaves no lasting impression (such as fingerprinting), through probing into the individual's private life, to whether the evidence is generally available to the public (such as facial features). In holding that the voice evidence did not breach the

accused's right to silence, Justice Welsh, writing the majority opinion, stated:

> Voice identification falls at the least serious end of the continuum. Though the participation of the individual is necessary, a person's voice is generally made available in a public way. Obtaining the evidence is non-intrusive in nature. While the person has some control over who may hear his voice at a particular time, social intercourse by way of conversation is normal, and it would not be unusual for a stranger to hear the speaker's voice. Further, a distinction may properly be drawn between the use of a person's voice for purposes of identification and for the content of what is said. The latter engages issues related to inculpatory admissions by an accused, and is not relevant in this appeal. [para. 24]

And further:

> ... Given the nature of social intercourse which permits even strangers to hear an individual's voice, it is difficult to conclude that the person's dignity, integrity and autonomy are affected by listening to the person speak. This must be contrasted with the content of what is said which may, in fact, reveal intimate details of lifestyle and personal choices.
>
> In summary, the fact that voice identification falls at the least serious end of the continuum affects the outcome in balancing the interests of the individual against those of the state in law enforcement. Obtaining the evidence is non-intrusive in nature. The individual's dignity and integrity are unaffected. The individual has a choice whether to speak. A voice does not, as such, generally engage a particular privacy interest since normal social intercourse makes the voice available even to strangers. Bearing these factors in mind, the right to silence has historically been concerned with content in the sense of confessions and inculpatory statements and admissions, not sound in the sense of identifying characteristics of speech. Finally, it is difficult to draw persuasive distinctions between auditory and visual identification of a person. In my view, the Charter guaranteed right to silence was not intended for this purpose. It seems to me that a person's face is as self-incriminatory as that person's voice. [paras. 26-27]

s.10(b) Charter: Right to Counsel

Prior to the administrative arrest process, the accused was advised of his rights under s.10(b) of the *Charter* and had called a lawyer. The lawyer then had the responsibility to explain to the accused his rights and to advise him how to exercise them. There was no obligation on the police to forewarn the accused about voice identification. The standard police caution gives a choice; it not only informs there is no obligation to say anything in response to the charge, but also is given with an invitation to make a statement about the offence. In this case the accused had been given the right to counsel and had consulted a lawyer before any contact with the Batman investigator. The lawyer could have advised the accused of his right to remain silent and the danger that someone may listen to his voice for the purpose of making voice identification. The lawyer could have explained the wisdom of not speaking or, if he did not wish to have the sound of his voice available to be heard and observed by others, he had the choice of, for example, whispering or disguising his voice while providing succinct answers and avoiding engaging in conversation during processing. The failure of the police to give the accused the advice that was apparently not given by counsel does not infringe the right to silence or turn a conversation into a search.

The Arrest

The accused challenged the arrest warrant on the basis that the police did not have reasonable grounds sufficient to identify him as Keith, absent the conversation when he was being held in lockup on the unrelated charge. In his view, since the conversation was not admissible as evidence at the trial, it could not be relied upon for purposes of establishing grounds for the arrest, which lead to the administrative processing and the second conversation that flowed from that. Although the trial judge concluded the police violated s.10(b) and excluded the conversation as evidence at trial, it could still be relied upon to form the reasonable grounds necessary to support the arrest, ruled Justice Welsh. He stated:

> [The accused's argument] relies for its validity on a similar test being applied in determining whether evidence is admissible at trial and whether there was sufficient information to ground an arrest. In fact, the two situations engage different issues and criteria.
>
> To lay an information to obtain an arrest warrant, the officer must have reasonable grounds to

believe that the accused has committed an indictable offence (section 504 of the Criminal Code). At the investigatory stage, prior to arrest or detention, section 10(b), the right to counsel and to be informed thereof, is not engaged.

Nonetheless, there is an established common law principle that an individual has the right to choose whether or not to speak with or respond to a police officer....

However, the police are not required to inform an individual of this right before engaging that person in conversation during a criminal investigation. The situation changes, and section 10(b) of the Charter applies, if the officer detains, either physically or psychologically, or arrests the individual. Prior to that time, the individual is free to refuse to converse with or respond to the officer.

The same principles apply in the case on appeal. Based on the right to silence... [the accused] was under no compulsion to engage in conversation with [the investigator]. The fact that he was detained in the lockup on other unrelated charges does not alter this conclusion. There is no basis on which to conclude that the conversation with [the investiagtor] was akin to an interrogation, that [the accused] was obligated or vulnerable to the police officer, or that the nature of the conversation was manipulative in the sense of attempting to bring about a mental state in which [the accused] was more likely to make admissions. The officer was interested only in hearing [the accused] speak. The content of the conversation was irrelevant to the officer.

Further, at the outset, [the investigator] told [the accused] he was a police officer. With this knowledge, [the accused] had the choice whether to speak to him or not. [The accused] had been advised of his rights under section 10(b) of the Charter, albeit for an unrelated charge. Presumably his counsel advised him that he could refuse to speak to the police.

In these circumstances, I am satisfied that, in order to determine whether [the accused] was the Keith Unknown in the wiretaps, it was open to the officer to engage [the accused] in conversation directed only to the question of identification without advising [the accused] that this was his purpose. This was a necessary preliminary step to establishing reasonable grounds on which to detain or arrest [the accused] on the charges of conspiracy and trafficking. Section 10(b) of the Charter was not engaged in respect of those charges, though [the accused] had the common law right to refuse to speak with the officer. There is no basis on which to conclude that [the accused] did not voluntarily engage in conversation with [the investigator]. The fact that [the accused] was detained in the lockup on other charges does not alter these conclusions. [paras. 39-45]

As a result, the first conversation (ruled inadmissible for trial) could be used for the reasonable grounds necessary to support the accused's arrest.

Another View

Justice Mercer, in dissent, would have ruled the second (post-arrest) conversation inadmissible. In his view, the first voice identification evidence was conscriptive and without it, the accused would not have been arrested eight days later. Thus, the voice identification evidence arising from the administrative processing would not exist. Therefore, it was conscriptive derivative evidence, which, in Justice Mercer's opinion, was not otherwise discoverable and therefore, as a general rule, would render the trial unfair. And conscriptive evidence rendering a trial unfair is presumptively inadmissible under s.24(2). In any event, the *Charter* violations were serious. Although the police did not threaten or induce the accused when they unobtrusively questioned him, there was no evidence that the first interview was motivated by circumstances of urgency or necessity.

Further, the Supreme Court of Canada has established that the law requires police to re-inform an accused in custody of their s. 10(b) right to counsel before interviewing them as a suspect in an investigation other than the one that prompted the arrest or detention. The investigator was negligent for proceeding as he did, violating well-established law unsupported by a subjective belief, reasonably based, that it was consistent with the law. Finally, admission of the evidence would bring the administration of justice into disrepute. Although drug offences are considered serious offences, the disputed voice identification evidence was not essential to the Crown's case. Justice Mercer concluded "that the integrity of the criminal justice system is best served by exclusion of the disputed evidence."

The accused's appeal was dismissed.

Complete case available at www.canlii.org

COULD v. WILL: WHAT's THE DIFFERENCE?

R. v. Ford, 2008 BCCA 94

Police began an investigation, code named "Project Amazon", into the production of marihuana on a number of properties in an isolated community located on a lake accessible by a single road or by boat. It had a very small number of permanent residents, but during the summer months its population increased substantially. The accused was a registered co-owner of one of the suspected properties—a 4 ½ acre parcel located in a wooded area on a dead end road.

A police officer sought and obtained several general warrants issued under s.487.01 of the *Criminal Code* from a British Columbia Provincial Court judge. These warrants authorizied investigative steps to be taken with respect to the accused's property and 16 others. The information to obtain included information from police officers and other sources, including confidential informers. Police wanted to covertly enter onto the properties under investigation and do several things, including verifying the presence of controlled substances, conducting physical surveillance, taking samples, using thermal imaging, and using a global positioning system. The general warrant stated that there were reasonable grounds to believe offences contrary to the *Controlled Drugs and Substances Act* (*CDSA*) and the *Criminal Code* have been, are or will be committed and that information, or evidence, that would assist the investigation of these offences could be obtained through a general warrant.

Police officers acting under the general warrant entered onto the accused's property and discovered two wooden frame buildings side-by-side. The larger building had two vent holes near the roof and officers saw white light coming from under a wall at ground level. They determined the interior walls and floor were lined with clear plastic, there was a lower level beneath the clear plastic floor, and the white light was being emitted from beneath the plastic floor. The odour of growing marihuana was also detected and a diesel generator could be heard running in the smaller building. Digital photographs and video recordings of the buildings and the surrounding area were taken as well as the coordinates using a global positioning device.

About three months later a second general warrant was obtained. Again, this warrant indicated that there were reasonable grounds to believe that information or evidence that would assist the investigation of the suspected offences could be obtained by covert entry. The warrant also allowed police to verify the presence of controlled substances. Police officers entered onto the accused's property and detected a strong odour of growing marihuana near the residence on the property and heard a diesel engine running. Then, about three weeks later, a s. 11 *CDSA* warrant to search was granted. Police searched the accused's property and found a sophisticated marihuana grow operation in the residence and outbuildings. Over 300 marihuana plants were seized.

At trial in British Columbia Supreme Court the accused argued the two general warrants were facially invalid and breached s.8 of the *Charter*. He submitted that the warrants contained the phrase "information, or evidence, that would assist in the investigation ... could be obtained through a General Warrant", rather than "will be obtained." The accused further contended that information about the marihuana grow operation gathered under the general warrants and later used to support the *CDSA* search warrant was also unreasonable and a s.8 breach. He suggested the evidence should have been excluded under s.24(2).

The accused also argued that the provision in the general warrants permitting the police to enter onto his property to "verify the presence of [drugs]" was invalid because such investigative action cannot be authorized under s.487.01 when the police already have sufficient information to obtain a search warrant under either s.487 of the *Criminal Code* or s.11 of the *CDSA*. The trial judge rejected both of the accused's arguments and he was convicted of drug and weapons offences. The accused then appealed to the British Columbia Court of Appeal again arguing the searches were unreasonable.

Could v. Will

Justice Frankel, delivering the judgment of the British Columbia Court of Appeal, upheld the trial judge's ruling. Section 487.01 states that a judge "may issue a warrant ... authorizing a peace officer to ... use any device or investigative technique or procedure or do any thing ... if the judge is satisfied

... that there are reasonable grounds to believe that an offence ... has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing ... ". The accused submitted that the expression "could be found" was equivalent to "may be found", which only requires the mere possibility of finding evidence, rather than the constitutionally required credibly based probability standard.

After reviewing the dictionary definition of the words "could" and "will", Justice Frankel ruled that they "can both be used to express habitual action or probability: in other words, something greater than a mere possibility." And further he stated:

> In the case at bar, I can come to no conclusion other than that the word "could" evinces that the issuing judges were satisfied there was a credibly-based probability or likelihood that the execution of the general warrants would assist in advancing the investigation. In the present context, "could be obtained" and "will be obtained" have similar meanings. Both general warrants are, therefore, facially valid. [para. 46]

He then went on to note that there are no pre-printed forms for general warrants in British Columbia, unlike s.487 of the *Criminal Code* or s.11 *CDSA* warrants. He suggested the person preparing general warrants should follow the practice of ensuring that recitals in a warrant track the language of the applicable statutes.

Verifying Drugs

The accused contended that s.487.01 did not permit a judge to authorize the police to enter onto property to "verify" the presence of drugs when they already had reasonable grounds to believe drugs were present. In order for them to obtain tangible evidence they should have obtained a s.487 warrant. The trial judge rejected this submission, holding the police are not limited when executing general warrants to obtaining information, which could not then become evidence. Instead he found s.487.01 provides police with authority to gather that which at first might be just information but, in time, might become evidence. Justice Frankel again upheld the trial judge's ruling on this point:

> I agree with the trial judge that there is nothing in the language of s. 487.01(1)(c) that precludes a peace officer from obtaining a general warrant solely because he or she has sufficient information to obtain a search warrant. Resort to a general warrant is only precluded when judicial approval for the proposed "technique, procedure or device or the doing of the thing" is available under some other federal statutory provision.
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> That the police are in a position to obtain a search warrant does not prevent them from continuing to investigate using all other lawful means at their disposal. Having regard to the requirements of s. 487.01(1)(a), I expect that in many cases the information the police present in support of an application for a general warrant would also support an application for a search warrant. I see nothing wrong in utilizing a general warrant to obtain information with a view to gathering additional and possibly better evidence than that which could be seized immediately through the execution of a search warrant. In addition, I expect there will be some cases in which investigative action taken under a general warrant will result in an investigation, or an aspect of it, being abandoned; e.g., where a covert entry reveals that a property does not contain a marihuana grow operation.
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> Although in April, 2004, the police had reasonable grounds to believe marihuana was being grown on the [accused's] property, the nature and scope of the investigation was such that it was not practicable for them to carry out a full search of the property until some months later. In my view, their decision to seek to "verify" the presence of marihuana on the property during the course of their continuing investigation was a reasonable one. However..., covert entry onto the property for this purpose would constitute an unreasonable search in the absence of prior judicial approval. As judicial approval for such an entry cannot be granted under s. 487 of the Code, s. 11 of the Controlled Drugs and Substances Act, or any other federal

"That the police are in a position to obtain a search warrant does not prevent them from continuing to investigate using all other lawful means at their disposal. ... I see nothing wrong in utilizing a general warrant to obtain information with a view to gathering additional and possibly better evidence than that which could be seized immediately through the execution of a search warrant."

statute, a general warrant under s. 487.01 was available.

This does not mean that it will be open to the police to obtain a general warrant in every case in which they have information to support the issuance of a search warrant. Assuming the criteria in s. 487.01(1)(a) and (c) are met, the judge before whom an application is made still has to consider whether issuing a general warrant is "in the best interests of the administration of justice"... [references omitted, paras. 50-53]

The accused's appeal was dismissed.

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

2006 B.C. COP STATS OUT

BC's Ministry of Public Safety and Solicitor General recently revised its authorized police strength by jurisdiction statistics for 2006.

2006 Police Jurisdictions over 100 Officers

Jurisdiction	Authorized Strength
Vancouver	1,214
Surrey (RCMP)	570
Burnaby (RCMP)	265
Victoria	221
Abbotsford	195
Richmond (RCMP)	193
Delta	151
Saanich	147
Kelowna (RCMP)	139
Coquitlam (RCMP)	134
Prince George (RCMP)	124
Langley Township (RCMP)	123
Kamloops (RCMP)	120
Nanaimo (RCMP)	118
New Westminster	107

Source: Police Resources in British Columbia, 2006 (revised February 2008) available at www.pssg.gov.bc.ca. Accessed March 30, 2008

SINGLE INCIDENT CAN FOUND CRIMINAL HARASSMENT CONVICTION

R. v. O'Connor, 2008 ONCA 206

A twelve year old boy became frightened while alone in the basement of his home when he noticed the accused tapping on the basement window. The boy's mother (complainant) told the accused, at the front door of the home, that she did not want to speak to him. But the accused tried to break into the house. The complainant left the house with her son and the accused pursued. After catching up with her, the accused blocked her way by circling around her. When she tried to call 9-1-1 he grabbed the telephone from her hands and punched her in the arm. Then, when the complainant followed her son to a store, the accused followed after them. At the time, the accused was bound by a probation order requiring him to have no contact with the complainant.

At trial in the Ontario Court of Justice, the accused was convicted of criminal harassment, assault, and breach of a probation order. The trial judge found the accused's conduct caused the complainant to fear for her safety. He was sentenced to five years' imprisonment for criminal harassment, three years' imprisonment concurrent for assault, and one year of imprisonment consecutive for breach of probation, in addition to 414 days of pre-sentence custody.

The accused appealed his conviction to the Ontario Court of Appeal arguing, in part, that the elements of criminal harassment were not proven since the charge arose from a single incident. He submitted that the evidence did not establish the necessary ongoing aspect of criminal harassment.

Justice Simmons, delivering the judgment for the Court, disagreed. A "single incident of threatening conduct can found a conviction for criminal harassment if, in the circumstances, 'the consequence is that the complainant is being harassed.'" Although "being in a harassed state involves a sense of being subject to ongoing torment, a single incident in the right context can surely cause this feeling", such as "where the complainant's feeling harassed would be proven [from] a single incident that carried the real

future prospect of the continuing tormenting of the complainant." (references omitted)

In this case, Justice Simmons found "the complainant was harassed both because the [accused's] behaviour during the incident was persistent and because the incident occurred while the [accused] was subject to a probation order requiring that he have no contact with the complainant." Justice Simmons continued:

> The finding that the complainant feared for her safety was available on the evidence, as was the trial judge's implicit conclusion that the complainant's fear was reasonable. In the light of this finding and the circumstances of the incident, in my opinion, the trial judge made no error in concluding that all of the elements of the offence were proven. Particularly given the [accused's] persistence in the face of the probation order, the complainant's fears would relate naturally to the prospect of ongoing torment, a fact that must have been obvious to the [accused]. [para. 9]

The accused's sentence appeal, however, was allowed. Considering his pre-sentence custody, the accused received a total sentence of seven years and 49 days imprisonment for the three charges. Justice Simmons found this sentence to be both disproportionate to the conduct underlying the offences and outside the range of what was appropriate in the circumstances. Although the accused had a lengthy criminal record, including 47 convictions for crimes against the administration of justice (breaches of court orders and recognizances, failing to appear, obstructing justice, and driving while disqualified) and a prior conviction of criminal harassment, the Court substituted a sentence of 39 months imprisonment in addition to the 414 days of pre-sentence custody on the criminal harassment, along with 12 months imprisonment concurrent on the assault charge and twelve months imprisonment consecutive on the breach of probation charge. This amounted to a total effective sentence in excess of four and a half years imprisonment.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

"Dream no small dreams for they have no power to move the hearts of men." - Johann Wolfgang von Goethe

OBSERVATIONS MADE DURING TRAFFIC STOP ADMISSIBLE AS EVIDENCE OF IMPAIRMENT

R. v. Townsend, 2008 ABCA 44

A police officer on routine patrol at a local Tim Horton's donut shop just after midnight was advised by a clerk that she had just served a customer at the drive-thru whom she thought might be impaired. The officer immediately left the restaurant and noticed only one vehicle in the area, which was leaving the parking lot. He followed the vehicle in his police car and saw it stop at a red light, but then proceed through the intersection prior to the light turning green. The vehicle made somewhat of an erratic unsignalled left turn into a hotel parking lot and parked in the middle of the driveway. The officer activated his emergency lights and approached the driver.

Before the officer could speak, the accused asked why he had been stopped and was told it was because of the driving infractions the officer had observed. He was asked to produce his driver's licence, registration, and insurance documents. The officer carefully observed the accused's movements, watching for signs of impairment, and noted he appeared dazed, his eyes were blood-shot, there was a strong smell of alcohol on his breath, and his speech was slurred. As well, he saw the accused was having difficulty finding and producing his documents—his dexterity was very poor and very slow.

The officer concluded that the accused's ability to drive was impaired by alcohol and he asked him to step out from his vehicle and accompany him to the police car, where he noted the accused was having difficulty with his balance during the short walk—his upper body swayed and he had difficulty standing up straight. The accused was arrested for impaired driving, told he would be charged with the two Alberta T*raffic Safety Act* (*TSA*) infractions and advised of his rights under s.10 of the *Charter*. He was transported to the police detachment where he contacted legal counsel and took a breathalyzer test, providing samples over the legal limit. He was charged with driving over 80mg%, impaired driving, and the traffic offences.

At trial in Alberta Provincial Court the accused argued that the Crown could not rely on his statements to the police or evidence that he was having difficulty producing his documents because it was conscriptive evidence elicited from him before he was advised of his right to counsel. He submitted that evidence as to the manner of his speech, as well as the fumbling of the documents, should be excluded from consideration as to whether he was impaired. The trial judge disagreed, admitted the signs of impairment, and convicted the accused of impaired driving and also the two *TSA* offences.

The accused successfully appealed to the Alberta Court of Queen's Bench. The appeal justice ruled the trial judge erred by relying on inadmissible compelled evidence (production of documents) obtained at the roadside. He found it was not a passive observation made by the police officer and, in the absence of not been given his *Charter* rights, was limited only to the reasonable and probable grounds in laying the charge. A new trial was ordered.

The Crown then appealed to the Alberta Court of Appeal arguing the appeal justice erred in excluding the observations made by the officer. The Crown contended that that the rule restricting the use of evidence—like cases where compelled participation by drivers during roadside screening can only be used as an investigative tool to confirm or refute suspicion a driver might be impaired, not as direct evidence to incriminate them—does not apply in this case because the officer's observations of impairment occurred while carrying out his authorized duties to enforce the *TSA*. In the Crown's view, the evidence of impairment observed by the officer (the slurred speech and the poor delivery of documents) was admissible as proof of impairment, and not restricted to determining whether reasonable grounds existed.

Justice Martin, delivering the opinion of the Court, agreed with Crown. Whether the limitation on roadside screening evidence applies to a case requires an analysis of the officer's rationale for stopping the vehicle, the nature of the questions asked, and the purpose of those questions. In this case, there was no suggestion the accused was asked about alcohol consumption or to perform any sobriety test. The officer had received a complaint of a possible impaired driver, followed the vehicle, and observed two driving infractions. The officer approached the vehicle to investigate these infractions and requested the accused provide his licence, registration, and insurance particulars. Justice Martin noted that what transpired was in line with the officer's duties under the *TSA*:

> While the constable observed the [accused's] speech and movements with a view to determining whether he was impaired, the entire interaction, at least until the time that the [accused] was asked to step from his vehicle and arrested, was in keeping with the issuance of tickets for Traffic Safety Act infractions. All drivers who have been observed committing infractions under the Traffic Safety Act are required by s. 167(1) to produce certain documents to enable the constable to issue tickets.
>
> To exclude observations made in the course of this encounter because the constable also had in mind the possibility that the [accused] may have been impaired is unwarranted. The investigation of one offence may lead to the investigation of another. It is unrealistic to think that police officers who stop vehicles for traffic offences are not also alert to the possibility that the driver may be involved in other offences.
>
> The limitation on the use of roadside screening evidence [in other cases] was intended to proportionally limit a driver's right to counsel by providing police only with an investigative tool to confirm or reject an officer's suspicion as to impairment. However, that restriction was not intended to apply to an officer's observations made in the course of carrying out otherwise authorized duties. Moreover, unlike the evidence obtained from sobriety or other roadside screening tests in those cases, the evidence here concerns the [accused's] appearances while being dealt with for traffic offences. Such observations are admissible to prove impairment in the same way as is evidence of drunkenness observed before a suspect entered a vehicle and began driving. The evidence of his appearance (such as slurred speech) existed independently of anything the officer did

"The investigation of one offence may lead to the investigation of another. It is unrealistic to think that police officers who stop vehicles for traffic offences are not also alert to the possibility that the driver may be involved in other offences."

> or said and would not change, whether or not the [accused] was advised of his right to counsel, or even immediately after he had contacted counsel. [paras. 18-20]

As a result, the Court concluded that an officer making observations of a driver, such as detecting signs of impairment like slurred speech or other similar signs, while carrying out other authorized duties would be admissible at trial to prove impairment.

The Crown's appeal was allowed, evidence of the accused's speech and his poor performance in producing documents was admissible as proof of his impairment. His conviction was restored.

Complete case available at www.albertacourts.ab.ca

BY THE BOOK:

s.167(1) of Alberta's *Traffic Safety Act*:

On the request of a peace officer, a person driving or otherwise having the care or control of a motor vehicle or trailer shall produce to the peace officer for inspection the following documents as requested by the peace officer:

(a) the person's subsisting operator's licence;

(b) the subsisting certificate of registration issued in respect of the motor vehicle and any trailer attached to the motor vehicle;

(c) the subsisting financial responsibility card issued in respect of that motor vehicle;

(d) the customs permit issued in respect of the motor vehicle where a customs permit has been obtained in respect of the motor vehicle's entry into Canada.

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (a) **True**—see *R. v. Borkowsky* (at p. 11 of this publication).
2. (a) **True**—see *R. v. Mallery* (at p. 14 of this publication).
3. (a) **True**—see *R. v. Nguyen* (at p. 7 of this publication).
4. (b) **False**—see *R. v. Abel & Corbett* (at p. 9 of this publication).
5. (b) **False**—see *R. v. Colson* (at p. 30 of this publication). The waiver standard is on the balance of probabilities, not proof beyond a reasonable doubt.
6. (a) **True**—see *R. v. O'Connor* (at p. 42 of this publication)
7. (a) **True**—see *R. v. Townsend* (at p. 43 of this publication)

DID YOU KNOW...

...that in North Carolina it is illegal to hold more than two sessions of bingo per week and those sessions may not exceed five hours.

§ 14-309.8. Limit on sessions.

The number of sessions of bingo conducted or sponsored by an exempt organization shall be limited to two sessions per week and such sessions must not exceed a period of five hours each per session. No two sessions of bingo shall be held within a 48-hour period of time. No more than two sessions of bingo shall be operated or conducted in any one building, hall or structure during any one calendar week and if two sessions are held, they must be held by the same exempt organization. This section shall not apply to bingo games conducted at a fair or other exhibition conducted pursuant to Article 45 of Chapter 106 of the General Statutes.

*** *** ***

...that federal law in the United States makes it illegal to issue a false weather report.

18 USC Section 2074. False weather reports.

Whoever knowingly issues or publishes any counterfeit weather forecast or warning of weather conditions falsely representing such forecast or warning to have been issued or published by the Weather Bureau, United States Signal Service, or other branch of the Government service, shall be fined under this title or imprisoned not more than ninety days, or both.

*** *** ***

...that in New Orleans it is against the law to curse a firefighter while they are in the performance of their duties.

Sec. 74-2. Cursing, etc., firefighters prohibited.

It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city fire department while in the actual performance of his duty.

NO OBLIGATION TO CEASE QUESTIONING WHEN DETAINEE ASKS TO SPEAK TO LAWYER AGAIN

R. v. Sinclair, 2008 BCCA 127

The accused was arrested on a Saturday by police for murder and advised that he had the right to retain and instruct counsel, that he could call any lawyer he wanted, and that if he could not afford a lawyer, a legal aid lawyer was available without charge. He was also told that if he wished to speak with a legal aid lawyer he would be given a telephone number to call. The accused was transported to the police detachment and booked-in. He provided the name of the lawyer he wished to call. He was taken from his cell and placed in a room where he was allowed to speak to his lawyer over the phone in private, a call that lasted some three minutes. About three hours later the accused again spoke to his lawyer for another three minutes. After each call the accused was asked by an investigator whether he was satisfied with speaking to his lawyer, to which the accused replied he was.

After the second call to a lawyer an undercover officer was placed in the same cell as the accused. Later that day he was taken from his cell and interviewed on audio and video tape. At the beginning of the interview, the officer confirmed with the accused that he had been advised of, and had exercised, his right to counsel. The officer also confirmed that the interview was being recorded and could be used in court. After answering a few questions as to where he had grown up, the accused told the officer that he didn't have anything to say until his lawyer was around to tell him what was going on. The officer told the accused that it was his decision whether to say anything, but that he was not entitled to have his lawyer present during the interview. The accused then indicated that he wanted to hear what the officer had to say.

The officer questioned the accused further about his background. He answered a few questions, then said he wasn't feeling comfortable not having his lawyer around and that he should be present while questioning was taking place. The officer said he could only tell the accused his rights and that it was for the accused to decide whether to talk to the police. The officer explained that the police are required to advise persons who have been arrested of their right to counsel, that he had twice spoken with his lawyer, and that he had indicated he was satisfied with having done so. The officer then told the accused he was not entitled to have his lawyer present during the interview and he needed to decide whether to answer the questions. The interview lasted for about 4½ hours and as it progressed the officer revealed more and more evidence the police had gathered, referring to it as "overwhelming". The officer suggested the accused might have an explanation for what had happened, such as alcohol or rage as well as suggesting the victim may not have been without fault.

The officer confronted the accused about finding a number of the victim's blood stains on the floor of a motel room. He said he would rather talk to his lawyer about it first and didn't want to say anything at the moment. The officer then disclosed the existence of two witnesses who had seen the accused trying to clean the blood stains in the motel room, played a portion of a video-taped statement made by one of those witnesses, and then asked for an explanation of what had happened. The accused said he wanted to talk to his lawyer again and would do so on Monday when he would see him again. The officer left the interview room and returned, telling the accused the police had found the victim's body and the bedding from the motel room, as well as the accused's DNA on the bedding (which was not true). The accused stated, "You got me I know it", and told the officer what had happened the night of the victim's death. He was returned to his cell and the undercover officer said, "That was a long time, it must be serious." The accused explained the events leading to the victim's death and essentially repeated what he had told the interviewing officer. Later that same night, the accused accompanied the police to where the victim had been killed and took part in a re-enactment,

"[The principle underlying the right to counsel found in s.10(b)] is to ensure that persons who are in the vulnerable position of just having been arrested or detained are informed of their right to obtain timely legal advice, particularly with respect to their right to remain silent."

which was audio and video taped, and he again repeated what he had earlier told the police about what had happened.

At trial in British Columbia Supreme Court the accused's statements to police were admitted. The justice ruled the police were not required to terminate the interview when the accused asked to speak with counsel again. In his view, the accused had been advised of his rights under s.10(b) and exercised them. The police were then entitled to continue the interview and were not obliged to stop nor allow the accused's lawyer to be present during the investigation or interrogation. Rather, the police are not permitted to override or overbear an accused's right to choose, such that an interview is so oppressive or overbearing that the person's decision to talk is no longer voluntary.

"[O]nce a detainee has exercised his or her right to counsel, the police are entitled to use legitimate means to persuade him or her to speak. I see no policy reason for providing a detainee, the peremptory right to [terminate an interview] by stating, "I want to talk to my lawyer again."

In this case the accused was aware that it was his choice whether to continue to speak to his interviewer. The justice concluded that although the accused "might have liked to have been able to talk to his lawyer, he understood what his choice was and the police were not obliged after he had been able to retain counsel to give him a further opportunity in this particular interview." The Crown had proven beyond a reasonable doubt that the accused's statement was voluntary. As for the accused's statement to the undercover officer, it was admissible because the undercover officer was not a person in authority and had not attempted to elicit any information or engage in discussions about the offence. The re-enactment was also admitted because the accused had participated in it voluntarily and the police were not required to "re-Charter or re-warn". The accused was convicted by a jury of manslaughter.

The accused appealed to the British Columbia Court of Appeal arguing the police were required to suspend further questioning when he requested another consultation with his lawyer and could not continue questioning him until he was provided a reasonable opportunity to do so. Justice Frankel, writing the decision of the Court, found the police are not under a duty to refrain from speaking with a detainee who has exercised their right to counsel merely because they want to talk to their lawyer again.

The principle underlying the right to counsel found in s.10(b) "is to ensure that persons who are in the vulnerable position of just having been arrested or detained are informed of their right to obtain timely legal advice, particularly with respect to their right to remain silent." As Justice Frankel noted:

> …The right to counsel is intended to ensure that detainees receive immediate legal advice so that they will be able to make informed choices in their dealings with the police. … [O]nce a detainee has exercised his or her right to counsel, the police are entitled to use legitimate means to persuade him or her to speak. I see no policy reason for providing a detainee, who does not have the right to terminate an interview by stating "I wish to remain silent", the peremptory right to do so by stating, "I want to talk to my lawyer again." [references omitted, para. 40]

"I fail to understand how the number of times a detainee asks to speak to counsel can make a difference when the police have already complied with s.10(b). If the police have no duty under s.10(b) to refrain from further questioning when such a request is made, then such a duty cannot arise simply because the request is repeated. To hold otherwise would create an unworkable situation for the police as it would be impossible for them to determine when to "hold off" in any particular case. The duty either exists, or it does not; there is no continuum."

Under s.10(b) the police have the duties to (1) inform the detainee of their right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel, (2) if a detainee indicates a desire to exercise this right, to provide them with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances), and (3) refrain from eliciting evidence from the detainee until they have had that reasonable opportunity (again,

except in cases of urgency or danger). After reviewing the case law Justice Frankel found "one constant theme: s.10(b) does not require the police to hold off when a detainee who has exercised his or her right to counsel asks to speak with a lawyer again."

Nor did the court accept the accused's submission that there were special circumstances requiring the police to stop questioning him until he had again spoken to his lawyer. Only having two three-minute phone conversations with his lawyer without an opportunity to meet him in person did not mean he did not have a meaningful discussion with his lawyer. The accused bore the burden of proving, on a balance of probabilities, that his opportunity to consult counsel was inadequate. Neither he nor his lawyer testified on the *voir dire*, therefore the specifics of the advice are unknown. The trial judge found that the accused was well aware of his right to silence.

"Once the police have fulfilled their obligations to a suspect under s.10((b), they are entitled to 'attempt to tap this valuable source'".

The fact he did not make incriminating statements until after the last of his five requests to speak with his lawyer were made and ignored did not require the police to refrain from questioning him. The Court stated:

> I fail to understand how the number of times a detainee asks to speak to counsel can make a difference when the police have already complied with s. 10(b). If the police have no duty under s. 10(b) to refrain from further questioning when such a request is made, then such a duty cannot arise simply because the request is repeated. To hold otherwise would create an unworkable situation for the police as it would be impossible for them to determine when to "hold off" in any particular case. The duty either exists, or it does not; there is no continuum. [para. 65]

Justice Frankel also rejected the accused's contention that he was entitled to speak with his lawyer again because, as the interview proceeded, his understanding of the case against him and, therefore, his jeopardy significantly changed when the interviewer revealed more and more about the evidence gathered by the police as their conversation continued:

> The flaw in this argument is that there was no change in [the accused's] jeopardy during the interview. He understood from the outset that he had been arrested for the murder of [the victim] and was, thereafter, in a position to make an informed decision as to whether to co-operate with the police in that investigation. The fact that [he] became more aware of the strength of the case against him over time did not amount to "a fundamental and discrete change in the purpose of the investigation" giving rise to a renewed right to obtain legal advice. [references omitted, para. 67]

Finally, the Court rejected the accused's arguments that the police should have allowed him to speak with his lawyer again because his request to do so was not a "dilatory tactic", there was no urgency to the investigation, and the police could have accommodated his request by suspending their interrogation until he had met with his lawyer on Monday (two days later). Even if true, this could not impose a constitutional duty on the police when none otherwise existed. "The interests protected by s. 10(b) of the *Charter* are served when a detainee is afforded an opportunity to obtain legal advice on how to exercise his or her rights," said Justice Frankel. "Once the police have fulfilled their obligations to a suspect under s. 10((b), they are entitled to 'attempt to tap this valuable source'".

"s.10(b) does not require the police to hold off when a detainee who has exercised his or her right to counsel asks to speak with a lawyer again."

The Court found there was no obligation on the police to stop questioning the accused when he asked to speak with his lawyer again. His appeal was dismissed.

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

LEGALLY SPEAKING:

Reasonable Grounds

"[T]he standard of proof is one of reasonable probability, a standard more than a flimsy suspicion, but less than the civil test of balance of probabilities and much lower than proof beyond a reasonable doubt." - British Columbia Supreme Court Justice Blair, R. v. Brand & Ford, 2006 BCSC 305 para. 39, affd 2008 BCCA 94