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

# IN SERVICE:10-8

A PEER READ PUBLICATION

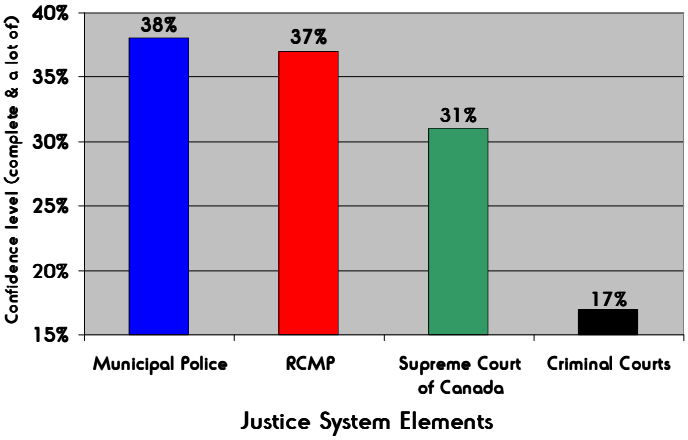
JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

## COPS TOP COURTS IN PUBLIC CONFIDENCE

In a recent Angus Reid Global Monitor Poll, more Canadians had confidence in the police than the other elements of the criminal justice system. And municipal police forces barely squeaked out the RCMP. Nationally, criminal courts ranked the lowest with 17% of those polled having complete or a lot of confidence in them. The Supreme Court of Canada was second lowest at 31%, beat out by the RCMP at 37% and municipal police at 38%. The Ontario and Quebec provincial police forces had 45% and 33% confidence ratings respectively.

Justice System Confidence

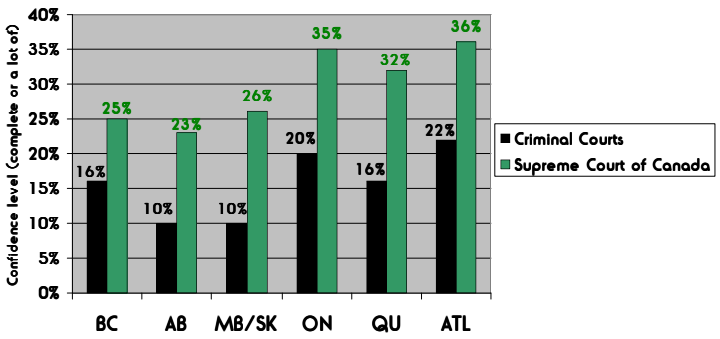



### Criminal Courts

The criminal courts had the lowest public confidence level with its internal operations and leadership. Atlantic Canadians had the highest confidence in their courts (at 22%) while Alberta, Manitoba, and Saskatchewan had the lowest (at 10%). British Columbia and Quebec were just below the national average (at 16%) while Ontario was slightly higher at 20%.

Canadians had greater confidence in the Supreme Court of Canada then they did in their criminal courts.

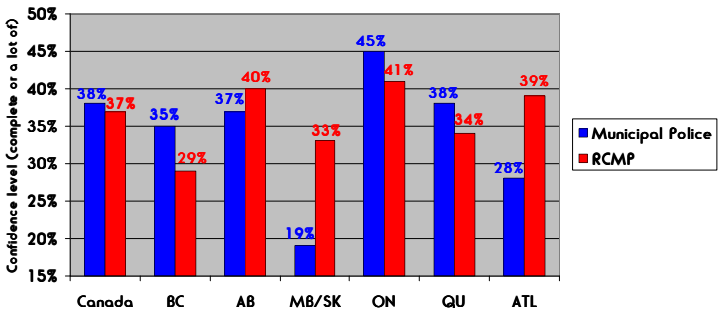
Courts Confidence




### Police

Police had the highest levels of public confidence across the country. However, public confidence levels differed across the regions. Municipal police and the RCMP had the highest confidence levels in Ontario (45% and 41% respectively). In British Columbia the RCMP had its lowest confidence rating at 29% while Manitoba and Saskatchewan had the lowest municipal confidence at 19%.

Police Confidence




Complete Angus Reid report *"Canadians Give Poor Reviews to Their Own Justice System"* available at www.angusreidstrategies.com/uploads/pages/pdfs/2008.07.15_JusticeII.pdf

For WPFG info see pages 18-19

## HIGHLIGHTS IN THIS ISSUE




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

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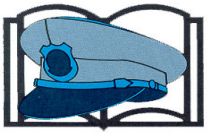
## 'IN SERVICE: 10-8' e-LETTERS TO THE EDITOR



*"I just had the opportunity to read one of your most current newsletters. What a great reference tool to keep all officers abreast of the changing laws in our country."* - **Police Inspector, Alberta**

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*"I have been reading your 10-8 newsletter and have found it to be great reading. Very informative!!"* - **Senior Police Constable, New Brunswick**

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*"I was hoping that you would be able to add my name to the electronic version of 10-8. I am a member of the Military Police...and the references made in the newsletter have been very valuable"* - **Military Police Officer, Ontario**

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*"Thank you for providing the 10-8 publication. It assists greatly when reading case law. I find that I could use another perspective after trying to digest case law directly from the SCC, Ontario Court of Appeals, etc."* - **Police Constable, Ontario**

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*"Could you please add me to your electronic distribution list for the 10-8 newsletter. It is always a good read, however, it can be hard to come by down at [police headquarters]."* - **Police Detective, British Columbia**

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*"[O]ne of the most informative newsletter[s] in the policing world in Canada. This publication ... is chalk full of new Case Law and changes to the Criminal Code. ... The publication ... is very informative from Breath tests to Drug charges and everything in between. ... Patrol members will certainly enjoy this document."* - **Police Sergeant, New Brunswick**

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*"I really enjoy the 10-8 magazine. The information is invaluable and with out it I don't know how we would keep up with all the changes to legislation."* - **Police Sergeant, British Columbia**

**www.10-8.ca**

# LEGALLY SPEAKING:

## Authorization Review Standard

"The trial judge has to consider whether there is sufficient reliable information on the basis of which the authorizing judge could have granted the authorization.

The authorizing judge must be satisfied that there are reasonable and probable grounds to believe that an offence has been, is being, or is about to be committed, and that the authorization sought will afford evidence of that offence. However, the trial judge does not stand in the shoes of the authorizing judge when conducting the review. The question for the trial judge is whether there was any basis on which the authorizing judge could have granted the authorization.

The trial judge should only set aside an authorization if satisfied on all the material presented, and on considering 'the totality of the circumstances', that there was no basis on which the authorization could be sustained. The trial judge's function is to examine the supporting affidavit as a whole, and not to subject it to a 'microscopic analysis.'" - British Columbia Court of Appeal Chief Justice Finch, *R. v. Lee and Tao,* 2008 BCCA 240, at paras. 12-14, references omitted.



## SHAKEN BABY SYNDROME (ABUSIVE HEAD TRAUMA) CONFERENCE

### October 5-7, 2008

The Seventh North American Conference on Shaken Baby Syndrome/Abusive Head Trauma is being held on October 5-7, 2008 in beautiful Vancouver, British Columbia. This year, over 100 specialized experts will be presenting from around the world, including a strong legal track.

****BC Residents**** Prevent Shaken Baby Syndrome BC has arranged a group rate reduction for all BC professionals and parents. The group rate for BC attendees is only $150 USD for the full three days of training. When registering, under Group Code enter BC Group Rate to receive the discounted rate.

For more information please visit
www.dontshake.org/conference2008

## 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 33 for the answers.

1. All occupants of a vehicle are presumptively detained when the vehicle is stopped for a traffic violation?
   (a) True
   (b) False

2. Asking a driver to blow into an officer's face for the purpose of determining the source of an alcohol odour is a permissible screening technique and does not engage the right to counsel under s.10(b) of the *Charter*.
   (a) True
   (b) False

3. Which province had the most appeals before the Supreme Court of Canada in 2007?
   (a) British Columbia;
   (b) Alberta;
   (c) Ontario;
   (d) Quebec.

4. The informational duty imposed on the police under s.10(b) of the *Charter* is to give the detained person notice of their rights, not to tell them how to exercise them.
   (a) True
   (b) False

5. A police officer need not make a s.254(2) *Criminal Code* approved screening device demand instantaneously upon discovering that the driver has alcohol in their body, but should do so promptly after the requisite suspicion is formed.
   (a) True
   (b) False

6. Which of the following was the most frequent offence in adult criminal court in 2006/2007?
   (a) impaired driving;
   (b) theft;
   (c) fraud;
   (d) breach of probation;
   (e) drug possession.

## CELL PHONE POSSESSION HELPS PROVE TRAFFICKING CHARGE

**R. v. Jama, 2008 MBCA 73**

An undercover police officer called a telephone drug line to make a purchase of drugs. A vehicle with four occupants, including the accused seated in the rear passenger seat, arrived at the meeting location within six minutes of the call. The accused was not involved in handling the drug, the money or speaking to the police officer. When arrested he said he was just getting a ride home. He was however, in possession of a cellular phone with a telephone number different than the "drug line" number but which rang when police dialled the number that was used to arrange the drug deal.

At trial the judge drew an inference that the accused had knowledge of and participated in the drug transaction. A police expert testified the usual practice with "dial-a-dealer" transactions was that all persons in the vehicle have knowledge of what is transpiring and that all people in the vehicle serve a purpose and perform a specific task. Further, the expert said a dial-a-dealer would not forward a drug line to another phone. Even though it may have been possible, the expert had never encountered such a circumstance in his experience. And finally, the cell phone was in the right, front pant pocket of the accused and rang when the number used to initiate the drug transaction was dialled. In convicting the accused of trafficking under s. 5(1) of the *Controlled Drugs and Substances Act*, the trial judge stated:

> The only reasonable inference to be drawn is that this telephone, the cellular telephone, the one that was tested and rang when the police officer redialed the number that was used for the original drug purchase and determined it was the same phone that had been used.
>
> There are no facts nor circumstances from which the court could draw a conclusion or an inference that the accused did not have knowledge of what was transpiring in that vehicle. Further, that the telephone was somehow put into his pocket without his knowledge is also quite speculative.

The accused appealed to the Manitoba Court of Appeal arguing the trial judge did not turn his mind to the possibility that the accused's cell phone rang when the drug line number was dialled by the police because a third party had forwarded the drug line number to the accused's telephone without his knowledge or participation. Justice Steel, delivering the unanimous opinion of the Court, dismissed the appeal. In her view, the inferences drawn by the trial judge were reasonable and the evidence did not give rise to any rational inference consistent with innocence.

Complete case available at www.canlii.org

## SUPREME COURT HEARINGS DOWN

In its Bulletin of Proceedings: Special Edition, *"Statistics 1997 to 2007"*, the workload of the Supreme Court of Canada has been outlined. In 2007, the Supreme Court heard 53 appeals. This is a 10 year low, 39% lower than the 10 year average, and 50% lower than 1998.

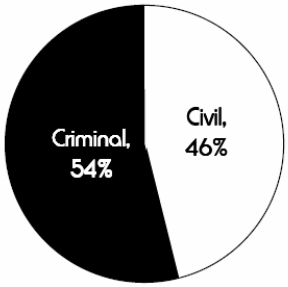
### Case Life Span

The time it takes to render a judgment from the date of hearing is at a 10 year high. In 2007 it took 6.6 months for the Court to render a decision. This is more than twice as long as it did in 1998 (2.8 months). Overall, it takes an average of 19.1 months for the Court to render an opinion from the time an application for leave to hear a case is filed. This time span is two months longer than it took in the preceding year (2006).

### Appeals Heard

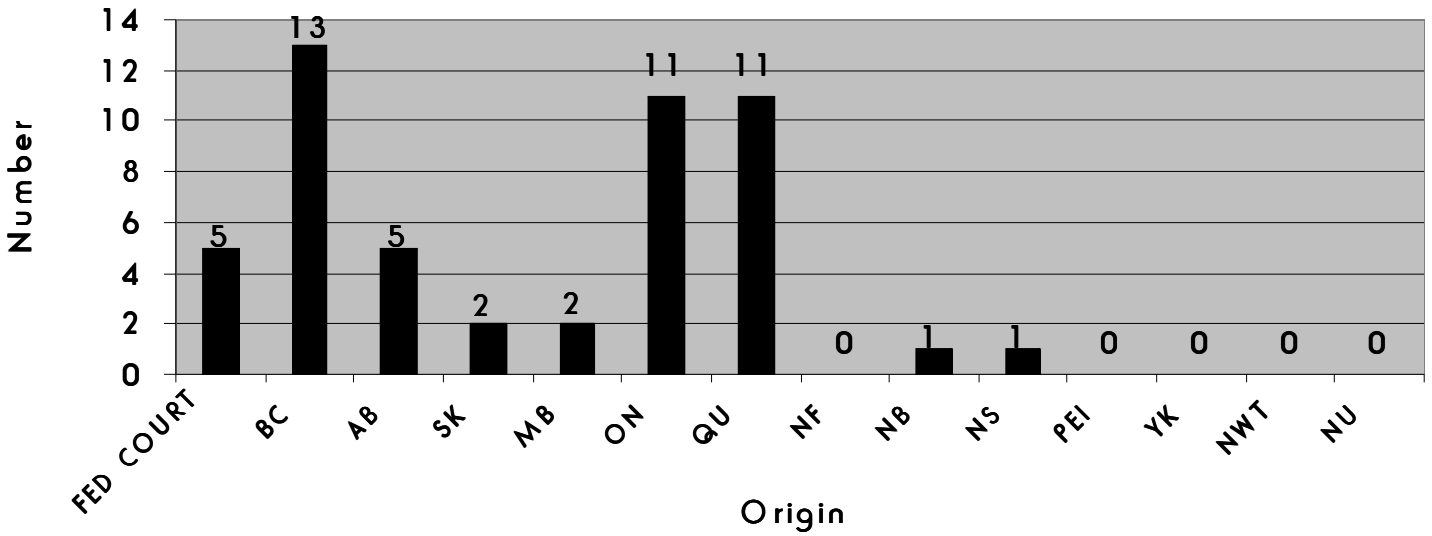
Of the 53 cases heard in 2007, British Columbia had the highest number of any province at 13, followed by Quebec and Ontario each with 11. No appeals originated from the Northwest Territories, Nunavut, Prince Edward Island, Newfoundland, or the Yukon.

Case Type




Of all the appeals heard in 2007, 54% were criminal while the remaining 46% were civil. Nine percent dealt with *Charter* criminal cases.

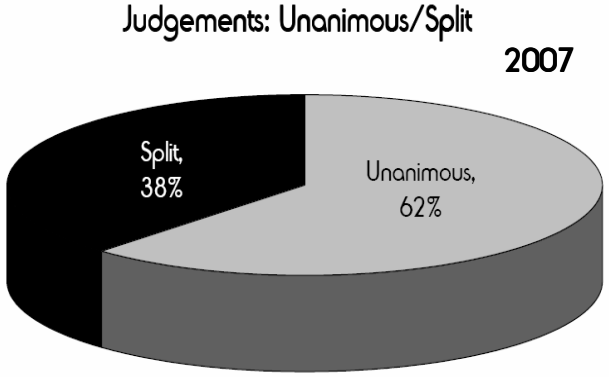
## Supreme Court: Origin of Appeals Heard




Ten of the appeals heard in 2007 were as of right. This source of appeal includes cases where there is a dissent on a point of law in a provincial court of appeal. The remaining 43 cases had leave to appeal granted. This is where a three judge panel gives permission to the applicant for the appeal to be heard.

### Appeal Judgments

Like appeals heard, appeal judgments were also at a 10 year low. In 2007 the high Court released 58 judgments, 21 fewer than the year before and 49 fewer than 1997. Two of the 58 decisions last year were delivered from the bench while 56 were delivered after being reserved. As well, 30 of the appeals were allowed while 28 were dismissed. And the court was more divided than previous years. In 2007 only 62% of the judgments were unanimous. This is down from 80% unanimity in 2006.




Source: www.scc-csc.gc.ca/information/statistics/download/ecourt.pdf

## SUPREME COURT FAST FACTS:

### What does a Judge Make?

The Chief Justice of the Supreme Court is paid an annual salary of $334,100 while the remaining puisne judges (judges other than the Chief Justice) make $309,300.

### When must a Judge Retire?

A Supreme Court justice holds office until they retire or turn 75 years old. They are however, removable for incapacity or misconduct by the Governor General on address of the Senate and House of Commons.

### What to Call a Supreme Court Judge?

Lawyers may use either "Justice", "Mr. Justice" or "Madam Justice," when addressing members of the Court during an appeal hearing. Counsel are asked to refrain from addressing the judges as "My Lord", "My Lady", "Your Lordship," or "Your Ladyship." In written correspondence, the Chief Justice is addressed as "The Right Honourable" and the other judges are addressed as "The Honourable Madam Justice" or as "The Honourable Mr. Justice".

### How Many Judges on a Case?

A minimum number of five judges must hear an appeal. However, usually seven or nine judges hear a case.

Source: www.scc-csc.gc.ca/faq/faq/index_e.asp#f11

# FOUR MINUTE DELAY IN WALKING DRIVER TO ASD UNREASONABLE

**R. v. Megahy, 2008 ABCA 207**

A police officer working a checkstop operation stopped a vehicle driven by the accused. The officer noted "a slight odour of alcohol" when the driver's window was rolled down and saw the accused had bloodshot eyes. The officer asked the accused whether he had been drinking. He said he had "three" and was then asked to produce his driver's licence. He fumbled through his wallet to find his licence and the officer asked the accused to accompany him to the checkstop bus, which was located across a major roadway and 1½ blocks away. The men walked to the bus and, once inside, the officer made a roadside demand, which took place four minutes after the stop. The accused failed the roadside screening device (RSD) and a breathalyzer demand was made. The accused failed the breathalyzer test and was subsequently charged with impaired driving and over 80mg%.

At trial in Alberta Provincial Court the investigating officer agreed he relied on the failed RSD test, in part, to form the opinion the accused was impaired and that he could easily have kept his RSD with him during the checkstop operation. The trial judge found the accused's *Charter* rights had been violated and could not be saved by s.1. In her view, the police officer failed to make the roadside demand "forthwith" upon forming the requisite suspicion and did not have the screening device with him at the roadside. The delay in administering the roadside test amounted to a serious *Charter* breach and the failed test result was excluded from evidence under s.24(2). The grounds for the breathalyzer demand were therefore inadequate, the certificate of analysis excluded, and the accused was acquitted of both charges.

On appeal by Crown to the Alberta Court of Queen's Bench the trial judge's decision was overturned. The appeal judge concluded the roadside demand need not be made immediately upon the officer forming the suspicion the driver has alcohol in their body, but only reasonably promptly in the circumstances. The four minute delay in this case was forthwith under s.254(2) of the *Criminal Code*, no *Charter* violation occurred, and there was no reason to resort to s.24(2). A new trial was ordered.

A further appeal to the Alberta Court of Appeal by the accused required the court to again consider whether the four minute delay in making the roadside demand did not satisfy the requirements of s.254(2) as the word "forthwith" is interpreted and therefore constituted a *Charter* violation. Section 254(2) authorizes an officer to make a roadside demand when they reasonably suspect that a person operating a motor vehicle or in care or control has alcohol in their body. The section requires the person to provide forthwith a breath sample to enable a proper analysis by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.

Justice Martin, authoring the Court's judgment respecting the "forthwith" issue, noted that the word "forthwith" is used only once in the section to require immediate compliance with the police officer's demand for a breath sample. It addresses post demand delay—the delay between the demand and the time it took the driver to provide the sample in response to the demand. The section, however, is silent as to pre-demand delay—the time permitted for the police officer to make the demand after forming the requisite suspicion. Nevertheless, the Supreme Court of Canada has determined that a detention and the temporary suspension of a driver's *Charter* rights (including the right to counsel) in the case of a roadside test will be saved by s.1 if the time is limited only as much as is reasonably possible. But a flexible approach and broad interpretation to the meaning of "forthwith" has been adopted and some leeway is permissible to allow a reliable test to be taken.

In assessing the delay it took for the police to make the demand in this case, the Court of Appeal ruled that the demand "should be made *promptly*, but not necessarily *immediately*" after forming the suspicion. Justice Martin continued:

> Moreover, the approach suggested by the [accused] would require a police officer to make a s. 254(2) demand instantaneously upon discovering that the driver has alcohol in his or her body, for fear of losing critical seconds. With respect, that proposition is untenable.

To illustrate, one may consider the following scenario. A driver is stopped at a police checkstop. The officer approaches and asks the driver if he or she has been drinking alcohol, and the driver replies in the affirmative. Using the [accused's] strict approach, any further questions (even to determine the amount of alcohol actually consumed or the apparent state of the driver's sobriety and ability to drive) would not be permitted, as the time taken to ask and answer the questions would put the demand a few seconds or minutes out of time. In other words, every driver suspected of having alcohol in his or her system, even those who had only one drink and would reasonably be considered fit to drive, would nonetheless have their constitutional rights suspended while subjected to a roadside demand and made to provide a breath sample or face a charge for refusing to do so. In short, rather than allowing the police officer to make reasonable, preliminary observations to determine whether a roadside demand is warranted or whether the driver is being truthful in claiming he or she had only one or two drinks, all drivers with any alcohol in their system would be tested without an opportunity to explain how much they had to drink or when. That would hardly be an efficient screening system.

> Clearly, a police officer must be allowed the time reasonably necessary to decide whether it is appropriate to make a demand for a breath sample under s. 254(2). This may include questioning to determine whether the driver has alcohol in his or her system as a result of having taken wine at communion, or having spent a day at a bar. No laudable purpose is met by continuing to detain the former driver to require him or her to submit to a roadside screening test. [references omitted, paras. 16-18]

In this case, Justice Martin found the delay in making the s.254(2) demand was not reasonably necessary. He stated:

"[A] police officer must be allowed the time reasonably necessary to decide whether it is appropriate to make a demand for a breath sample under s.254(2)."

> It will be recalled that the officer was specifically assigned to participate in the checkstop and knew he would require the roadside screening device, yet he kept it in the bus 1½ blocks away. The officer's explanation for keeping the roadside screening device in the bus amounted to a matter of personal choice and convenience rather than inadvertence or necessity. Thus, for no good reason, the officer required the [accused] to walk approximately four minutes from the location of the checkstop to the checkstop bus, at which time the roadside demand was made. The pre-demand delay was relatively minor, but because it was unnecessary and unreasonable in the circumstances, it constitutes a violation of the [accused's] Charter rights. [para. 20]

The accused's appeal was allowed, the trial judge's ruling in excluding the evidence under s.24(2) was upheld, and the acquittal was restored.

Complete case available at www.albertacourts.ab.ca

# BY THE BOOK:

## s.254(2) *Criminal Code* (***new July 2, 2008)


If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol:

(a) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and

(b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

## ASD Time Sequence-a flexible approach

**Pre-demand delay:** time the police took to make the demand.

**ASD demand**

**Post demand delay:** time the police took to administer the test.

**Time of driving or care or control** — **"promptly, but not necessarily immediately"** — **"forthwith"** — **Time of Test**

# PERMISSIBLE SCREENING TECHNIQUE INCLUDES REQUEST TO BLOW IN OFFICER'S FACE

**R. v. Weintz, 2008 BCCA 233**

A motorist saw a pickup truck being driven in an erratic manner and called police. The vehicle was observed go over the middle line of the highway and then overcorrect and go almost to the edge of the road. The responding police officer followed the vehicle for a short distance, saw it wander away from the centre line to the fog line and back again, and then pulled it over. As the officer spoke to the accused (driver) at the truck's window, he could smell an odour of liquor coming from inside the vehicle.

The officer asked the accused if he had been drinking anything. Before the accused could answer, a passenger took responsibility for any smell of liquor. The officer then asked the accused to get out of the vehicle and directed him to blow in his face. He complied and the officer detected an odour of alcohol on his breath. An approved screening device (ASD) demand was made and the accused failed the test. He was given his *Charter* rights and a breathalyzer demand. The accused subsequently provided breath samples indicating a blood alcohol content of 120mg%. He was charged with impaired driving and with driving over 80mg%.

At trial in British Columbia Provincial Court the accused argued that his *Charter* rights were infringed when the officer requested he blow breath into his face. The trial judge disagreed and the accused was convicted on the over 80mg% charge.

The accused successfully appealed to the British Columbia Supreme Court. The appeal judge recognized that physical co-ordination tests, which would merely provide an opportunity for the police to observe the accused's command of his faculties during a traffic stop, constituted a reasonable limit on the right to counsel under s.10(b), but in this case the accused was not asked to perform such tests. Instead, he was requested to blow into the officer's face which was conscripting a form of bodily sample. This breached the accused's rights under s.8 (unreasonable search and seizure) and s.7 (life, liberty, and security of the person) of the *Charter* which could not be saved under s.1. Further, the appeal judge ruled the evidence inadmissible under s.24(2) because its admission would bring the administration of justice into disrepute. The accused's appeal was allowed and he was acquitted of the over 80mg% charge.

The Crown then appealed to the British Columbia Court of Appeal submitting the request by the officer for the accused to blow in his face was a permissible infringement of the accused's *Charter* rights. The accused, on the other hand, argued the request to blow was an investigative technique that was different from asking a driver about drinking or a request to perform physical tests at the roadside to assess sobriety.

Justice Hall, writing the reasons for the Court, first noted that a police officer is permitted to stop a driver and perform screening tests aimed at determining whether the driver had alcohol in their body without advising them of their right to counsel under s.10(b) of the *Charter*. "Any violation was found to be justified under s.1 of the Charter because the right accorded under s.10(b) was incompatible with the proper functioning of the important objective of detecting and deterring drunk drivers and the rights provided by s.10(b) were minimally infringed because the detention was brief," said Justice Hall. Permissible screening tests that may be conducted prior to advising a driver about the right to counsel include asking them about alcohol consumption, physical sobriety tests, or roadside breath tests using an approved screening device.

Justice Hall concluded that the request to blow in the face of the officer was a permissible roadside screening technique. He stated:

> In the present case, I … do not perceive any distinction between [investigative procedures such as a physical sobriety test or asking a driver questions about drinking] and asking a person to blow breath into the face of the investigating officer. All are simply different roadside screening methodologies utilized by a police officer to detect the presence of alcohol in the body of a driver. In the instant case, such a request was reasonable because of the factual circumstances of this case. When the officer here directed a question to the [accused] about drinking, there was an immediate response from the adult passenger that he had

> been drinking and that any odour of alcohol in the vehicle was presumably attributable to the passenger. It then became requisite for the officer to determine the source of the odour of liquor. An effective and speedy methodology of doing such an assessment was to make the request the officer did to this [accused]. Such a procedure is, in my opinion, minimally intrusive and can be speedily performed at the side of the road. [para. 22]

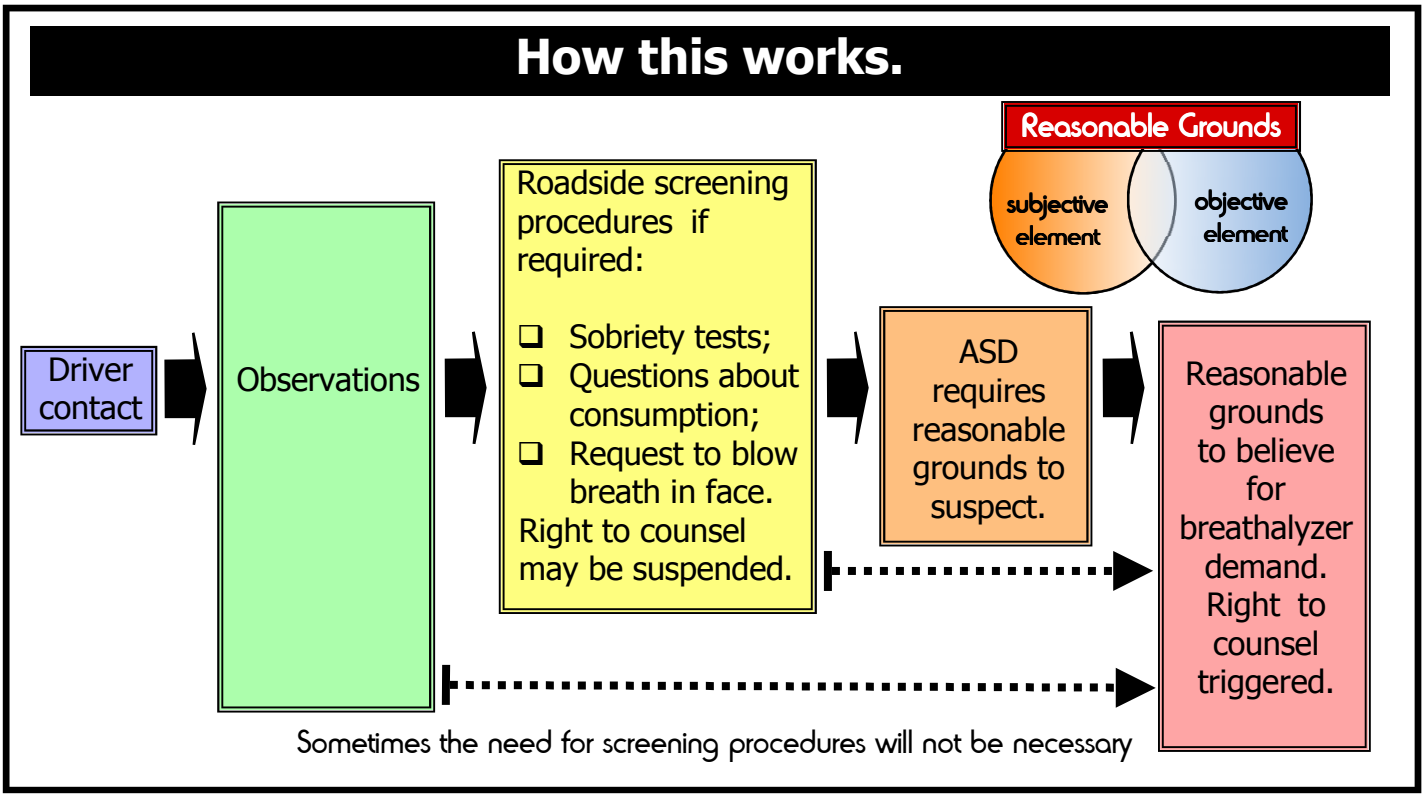
And the request to blow in the face of the officer was not akin to being conscripted to incriminate oneself such as a case where police take hair samples, teeth impressions or buccal swabs for DNA from an individual arrested and in police custody. "The results of roadside screening techniques or questions about alcohol consumption are not to be utilized as evidence to incriminate a driver," said Justice Hall. Rather, evidence obtained as a result of roadside screening procedures without the right to counsel is used as an investigative tool to confirm or reject the officer's suspicion that the driver might be impaired. The results of the roadside screening procedures are limited to determining whether there existed a proper basis to make a demand for a breathalyzer sample:

> [T]he request to blow breath was not for the purpose of obtaining evidence to incriminate the [accused]. The possibility of obtaining evidence that could incriminate the [accused] only arose at that point in time when the investigating officer concluded he had reasonable and probable grounds to believe that the individual had been driving whilst impaired or had consumed alcohol to an extent to have a blood alcohol reading over .08. At that point in time, of course, the required information must be furnished to a driver that he has the right to retain and instruct counsel without delay and the driver is to be afforded such right (Charter s. 10(b)). [para. 25]

When the officer requested the accused to blow breath in his face he was not being asked to provide evidence that could be used to incriminate him, unlike the situation when a breathalyzer test is requested. The request is simply part of a roadside screening process, similar to sobriety tests or asking about alcohol consumption, where the information obtained is not available to incriminate the driver, but merely for the purposes of establishing the officer's grounds for demanding a breathalyzer sample at which point they are entitled to the full protection of s.10(b).

The Crown's appeal was allowed and the matter was remitted back to the Supreme Court of British Columbia to resolve the remaining issues yet to be decided in the original appeal from conviction.

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



# POLICE DUTY IS TO INFORM, NOT GIVE LEGAL ADVICE

**R. v. Willier, 2008 ABCA 126**

The accused was identified as a suspect in the stabbing death of an adult female. He was located at his brother's house at 12:40 pm and arrested, but was not advised of his right to counsel. Thinking he might be in some medical distress, the police discussed his health, recent drug use, and about taking him to the hospital. He said, "Okay, you guys are done (U/I) I want a lawyer, I don't want to be questioned." He was then taken to the hospital, treated and advised of his right to counsel (about five hours after his arrest). He said he understood his rights but did not want to speak to a lawyer right then, he wanted to wait until the next day. He was released from the hospital at about midnight and taken to the police station.

He was again read his rights, indicated he wanted to speak to a free lawyer, and legal aid was called. The call lasted approximately three minutes and he was returned to his cell. The next morning at 7:50 am the accused was taken from his cell. He asked to call a lawyer again. After some discussion, the accused's lawyer of choice was called and a message was left on his answering machine. The accused initially declined to call another lawyer, but did speak to legal aid once again for one minute. About 50 minutes later the accused was re-cautioned, indicated he was satisfied with the legal advice he had obtained, and told he could talk to a lawyer again if he wished. His right to remain silent was repeated, but he nevertheless provided a lengthy statement.

At trial in the Alberta Court of Queen's Bench the judge found the accused's statement was voluntarily given. The officer was courteous throughout the interview, there were no inappropriate inducements offered, and the accused was very engaged, alert, focused, and rational. The judge did, however, conclude that there were two breaches of the accused's *Charter* rights.

1) When the accused was arrested at his brother's apartment, he was not advised of his right to counsel. He described the police conduct in obtaining medical treatment for the accused as "a very commendable course of action", but was nonetheless satisfied he should have been advised of his right to counsel at this time and provided an opportunity to exercise it since his medical condition was not as serious as police assumed.

2) The following morning the accused was denied his right to a reasonable opportunity to consult counsel of his choice before the interview commenced. He found the police "actively discouraged" the accused from waiting for a return call back from his lawyer of choice and "immediately directed him to Legal Aid". Instead of proceeding with the interview, the officer should have waited to see if the accused's lawyer of choice called back, make another call to his office an hour or two later, or even wait until the next day when his office was open.

In the trial judge's view two calls to Legal Aid totaling only four minutes were insufficient to allow for a "meaningful" opportunity to instruct and retain counsel. And the accused had not waived his right to a reasonable opportunity to contact counsel of his choice. He was unaware that the police had a duty to cease questioning him until he had a reasonable opportunity to consult counsel of his choice and could not waive a right he did not know he had. The admission of the statement would affect the fairness of the trial and it was ruled inadmissible. The accused was acquitted of murder.

The Crown then appealed to the Alberta Court of Appeal which had to decide whether the accused's s.10(b) rights were breached or waived by him and whether the evidence should have been excluded under s.24(2).

## s.10(b) Duties

Justice Slatter, authoring the majority judgment, first examined the three duties imposed upon the police under s.10(b) of the *Charter* when they arrest or detain a person:

1) to 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; and

2) if a detainee has indicated 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) to refrain from eliciting evidence from the detainee until they have had that reasonable opportunity (again, except in cases of urgency or danger).

## Informational Duty

The majority described the informational duty this way:

> The informational duty of the police is to give "information" or "notice" to the accused of his right to counsel. There is no duty on the police to give the detained person legal advice, including advice on how he should exercise his right to counsel. Indeed, were the police to give legal advice to the detained person, that might confuse or even mislead the detained person about his rights. When the detained person wishes to speak to "counsel of choice", and in the short term can only access a Legal Aid lawyer, any advice about how to exercise the right to speak to counsel of choice should come from the Legal Aid lawyer, not from the police… [para. 36]

And further:

> …the informational duty of the police is to give the detained person notice of his rights, not to tell him how to exercise those rights. The police are not there to give the detained person legal advice. … [para. 40]

The duty to hold off and provide a reasonable opportunity is not an informational duty, it is primarily an implementational one and there is no general rule requiring the police to inform the detainee that they are doing so.

Here, the police had discharged their informational duty. The accused was told he had the right to counsel and that he could contact any lawyer he wanted and could immediately access a legal aid lawyer without charge. This was not a situation where a detainee initially asserted their right to counsel and was duly diligent in exercising it (having been afforded a reasonable opportunity) but had a change of mind and no longer wanted to consult counsel. If this was the case, the police had an additional informational obligation known as a "Prosper warning". The Prosper warning requires police tell the detainee of their right to a reasonable opportunity to contact a lawyer and the obligation of the police not to take any statements or require the detainee to participate in any potentially incriminating process until the detainee has had that reasonable opportunity. However, the rationale of Prosper does not apply to a "counsel of choice" situation where the detained person has spoken to duty counsel, as duty counsel should explain to the detained person the rights they have, obviating the need for the "additional informational obligation" on the police. Here, the accused had access to duty counsel and did not change his mind before consulting counsel, so the additional informational obligation did not apply.

## Implementational Duties

The implementational duties are only triggered if a detainee indicates a desire to contact counsel. "Determining what is a reasonable opportunity to contact counsel depends on the factual context," said Justice Slatter. The detainee must then be diligent in exercising their right to counsel and may waive their rights and make a statement.

In this case the police arranged contact with Legal Aid, reminded the accused that he had a right to contact counsel of choice, and assisted him in telephoning his lawyer. The lawyer's office was closed, but there was nothing the police or accused could do about that. Proceeding with the interview only 50 minutes after a message was left on the lawyer's answering machine did not breach the implementational duties. A reasonable opportunity to contact counsel depends on the factual context of the case. Here, it was a Sunday, unlikely that any lawyer's office would be open that day, and there was no evidence that the lawyer's answering machine was even checked on the weekends. The investigation was not urgent, in the sense that it did not depend on evidence that might disappear or deteriorate in the short term. The accused had spoken to Legal Aid twice, said he was satisfied with the advice he had received, and expressed a clear understanding of his right to remain silent.

"The informational duty of the police is to give "information" or "notice" to the accused of his right to counsel. There is no duty on the police to give the detained person legal advice, including advice on how he should exercise his right to counsel."

After being re-cautioned on the right to silence and the right to counsel 50 minutes later, the accused made no further request to speak to counsel before being interviewed. He knew he had not spoken to his lawyer and that he had a call outstanding to him. Absent a further request to speak to counsel the police were entitled to assume the accused was content with his inquiries. "When the detained person makes a statement without asking for further legal advice the police are not required to guess that he needs more time, or what is going on in his mind," said Justice Slatter.

## Quality of the Legal Advice Received

The accused argued that the quality of the legal advice he received breached his *Charter* right to "counsel of choice" because it was inadequate. He suggested that his counsel of choice would have been more diligent and given him better advice. Thus, he was prejudiced by the inadequacy of advice he received and it was impossible for him to get appropriate advice during the short calls (three minutes and one minute) with the Legal Aid lawyer. In rejecting this argument, Justice Slatter stated:

> There is however no way that the police could know that. The telephone calls are privileged, and the police are not entitled to listen in on them, or to ask the detained person what advice was given. Even if the detained person blurted out the advice, it would be inappropriate for the police to second-guess that advice, as that undermines the relationship between the detained person and counsel.
>
> Even if the advice was inadequate, that is not something for which the police are responsible. The legal system cannot tolerate a disincentive for an accused to consult competent counsel, or an incentive for competent counsel to give incompetent advice. The police are required to notify the detained person that he has a right to counsel, not to audit that advice once given. The police should not be expected to stand by the interview room with a stopwatch, and insist that the detained person and counsel stay on the line for some minimum amount of time. For one thing, it is impossible to know what that minimum amount of time might be. Secondly, even if the conversation was lengthy, there is no assurance (and no way the police would know) that the advice given was appropriate, not just verbose. [paras. 27-28]

"The police are required to notify the detained person that he has a right to counsel, not to audit that advice once given. The police should not be expected to stand by the interview room with a stopwatch, and insist that the detained person and counsel stay on the line for some minimum amount of time."

And later:

> …We are unable to agree with the suggestion that the police have a duty, or the ability, to monitor the quality of the advice received by the detained person in any particular case…
>
> ……
>
> The responsibility of the police was to inform the respondent that he had the right to counsel, and to give him the means to exercise that right. Any breach of his rights must arise out of those responsibilities. Whatever other remedies might accrue to the respondent, the quality of the advice, or lack thereof, is not per se a basis for the exclusion of a statement under s. 10(b) of the Charter. The trial judge's conclusion that there was a Charter breach, based partly on the inferred inadequacy of the legal advice the respondent received from Legal Aid, was an error of law. [para. 29-31]

In this case, the accused did not testify, nor did his lawyer of choice or the Legal Aid lawyer. Nor did calling a well-known criminal defence lawyer, as an expert witness, outlining the type of advice he would give a detained person charged with murder and explaining it would be impossible to give appropriate advice in less than five minutes assist. Speculation about the nature of the advice that might have been given was not appropriate. As for whether the police should have waited an hour or two to see if the accused's lawyer could be contacted, there was no evidence the lawyer ever called back and therefore no basis to conclude that only waiting 50 minutes before commencing the interview had any effect at all. And there was no evidence that the lawyer's home telephone number was publicly available. The accused bore the burden of proving a *Charter* breach and failed to do so. He could have testified on the *voir dire* or called his lawyer or Legal Aid, but did not.

## Waiver

After re-cautioning him on the right to silence and the right to counsel, the police commenced the

interview and the accused made a statement without requesting a further opportunity to speak to counsel. Waiver is not a purely subjective exercise, but can arise by conduct where a person with an operating mind does something that an objective observer would reasonably assume that the person was waiving the right. However, there is no duty on the state to protect a detained person beyond advising them of their rights and providing access to counsel. Proving waiver rests on the Crown. And waiver by conduct (speaking to the police) can be effective. A detainee can choose to waive the right to speak to counsel or to counsel of choice.

"The law is clear that the police are entitled to continue questioning a detained person even after that person has been advised (and expressed an intention) to remain silent."

A detainee can also choose to waive their right to silence. "Within limits, the police can attempt to persuade the detained person to waive his rights and make a statement, even if he initially expresses an intention not to do so," noted Justice Slatter. "The law is clear that the police are entitled to continue questioning a detained person even after that person has been advised (and expressed an intention) to remain silent."

Here the trial judge erred in law by applying the test for waiver subjectively. The accused had an operating mind and knew his rights. He was told of his right to silence, his right to counsel, and his right to counsel of choice. The police discharged their informational duty. The accused spoke to Legal Aid on two occasions and said he was satisfied with the advice. The police were therefore entitled to attempt to obtain a statement from him absent any further request to speak to counsel of choice. The Crown discharged its burden in showing waiver, and the police were entitled to proceed with their investigation. There was no breach of the implementational duties of the police. And even if the accused's rights were breached, the majority would have admitted the evidence under s.24(2) anyway.

### A Different View

Justice Bielby found the police should have waited longer for the accused's lawyer of choice to call back. She stated:

> I conclude that the failure of the police to wait for a reasonable period of time to allow [the accused's lawyer of choice] to return [his] call after the commencement of business hours on the following Monday morning amounted to a s. 10(b) breach given that … the charge facing [the accused] was extremely serious and there was no particular urgency created by the need to preserve evidence or otherwise in the investigation. The learned trial judge did not err in law in determining that the two telephone calls to duty counsel did not provide [the accused] with a reasonable opportunity to exercise his right to meaningful contact with and the receipt of satisfactory advice from a lawyer. Having expressed a wish to speak to his own choice of lawyer prior to being interviewed, [the accused] was entitled to do so if it was possible within a reasonable period of time. He was entitled to wait until [his lawyer] returned his call or to once again attempt to reach [his lawyer] during normal business hours before being interviewed by the police. Taking into account the factual context in this case, [the accused's] s.10(b) rights were infringed as a result of being interviewed in these circumstances. [para. 77]

As for waiver, Justice Bielby found the accused had not waived his right to counsel because he did not know what his rights were. Before being interviewed, he was not told he had the right to wait a reasonable period of time for his own lawyer to return his call.

The Crown's appeal was allowed and a new trial was ordered.

Complete case available at www.albertacourts.ab.ca

# LEGALLY SPEAKING:

## Detention

"The concept of detention has evolved since the Charter came into force and it is not always easy to determine in given circumstances whether and when it legally occurs. From the mere investigation to which a person wilfully collaborates to the custodial arrest of that person, there is a wide spectrum encompassing the varying degrees of legal jeopardies in which the state can put individuals; in some cases, the precise moment when detention arises is by no means easy to ascertain." - Supreme Court of Canada Justice Gonthier, *R. v. Schmautz*, [1990] 1 S.C.R. 398 at p. 415.

# OBSERVING ICONS WITHOUT VIEWING CHILD PORN PROVIDED REASONABLE GROUNDS

**R. v. Morelli, 2008 SKCA 62**

A computer technician attended the accused's residence, where he lived with his wife and two children, to install a high-speed Internet connection for a home computer. In the spare bedroom where the computer was located, the technician saw a web-cam on a tripod which was plugged into a VCR. The web-cam was pointed toward the accused's three year old daughter who was playing with some toys on the floor. On the computer screen the technician observed two icons on the computer desktop, one entitled "Lolita Porn" and one entitled "Lolita XXX".

Because the technician could not complete the high-speed Internet connection that day, he returned the following day and found the children's toys were put away, the web-cam was turned toward the computer chair, and the computer hard drive had been formatted and all web site links were removed from the desktop. About two months later the technician reported what he saw. The investigating police officer obtained more information from two other officers familiar with computers and who were specialists in child pornography.

The investigator was able to confirm that "Lolita" was an underage Internet porn site that primarily dealt with children 14 years old and under. He also learned that child porn offenders are habitual, will continue their computer practices with child pornography, treasure collections on their computer, and like to store them and backup data in case it is lost. As well, he learned that information will remain inside the computer's hard drive and can be stored on media devices such as compact disks and floppy disks. The investigator then obtained a search warrant about two months after the report was made to search the accused's residence for the computer and seize evidence of an offence under s.163.1(4) of the *Criminal Code* (possession of obscene material — child pornography).

"The search warrant is the investigative tool which opens the premises of a person with possession of the article(s). A high degree of precision is expected in the documents supporting a request to issue a search warrant."

At trial in the Saskatchewan Court of Queen's Bench, the accused challenged the validity of the search warrant and argued the Information did not provide reasonable and probable grounds to issue the warrant. He submitted, among other grounds, that the presence of a child pornography icon on his computer was insufficient for the officer to believe that child pornography images were stored in the computer. The trial judge disagreed and concluded this was sufficient to satisfy the authorizing justice that child pornography images existed in the computer. The accused was convicted of possessing child pornography and he was given an 18 month conditional sentence order.

The accused then appealed to the Saskatchewan Court of Appeal arguing, in part, that the presence of the icons that were removed the following day, without actual images of child pornography, raised only a mere suspicion child pornography may exist but did not provide reasonable grounds to support the allegation of possession of child pornography. The Crown, on the other hand, countered that when reading the Information as a whole the statutory requirements of s.487 of the *Criminal Code* had been met.

## The Search Warrant

The warrant in this case was issued under s.487. In describing the purpose of a warrant and its requirements, Justice Hunter, writing the majority opinion, stated:

> The search warrant is the investigative tool which opens the premises of a person with possession of the article(s). A high degree of precision is expected in the documents supporting a request to issue a search warrant. Both the documents in support of the search warrant and the search warrant itself must contain a description of goods to be searched for by the executing officer and the issuing justice must be satisfied that the goods described, if found, will afford evidence of the commission of an offence. The basis of suspicion must be set out in the information which should demonstrate the nexus between the goods to be seized, the place where they are located and the offence.
>
> A justice of the peace may issue a warrant to search and seize item(s) where the

> conditions prescribed in s. 487 are met and the justice is satisfied there are reasonable and probable grounds to believe the item(s) is in a building, receptacle or place. … [paras. 17-18]

The test for reasonable grounds is one of reasonable probability based on the totality of the circumstances, not proof beyond a reasonable doubt or even a prima facie case. And in reviewing a search warrant, a trial judge is not to substitute their view for that of the authorizing judge. Rather, the test is whether the authorizing judge could have granted the warrant.

In this case the technician did not see any actual images of child pornography on the accused's computer. And when he returned the next day, the computer had been reformatted and the icons were no longer present on the desktop. However, the majority found the presence of a child pornography site icon on the accused's computer desktop was sufficient to infer constructive possession of child pornography in order to obtain a search warrant.

*Criminal Code* possession under s.4(3) can be personal, constructive, or joint. Unlike actual possession which requires physical control, constructive possession does not. Instead, control in constructive possession "arises from the person having or putting the thing at a place for his use or for the use of another person." For the purpose of obtaining a search warrant, Justice Hunter found that it was not necessary to establish the accused actually viewed child pornography. He said:

> In viewing images on a computer, a person has control in that he may dwell on, pass over, go back to an image, and decide whether or not to save the images. It is similar to a person choosing to look at a book at the library and then choosing to put it back rather than making a copy or signing the book out. In all cases, the person has control. Therefore, whether the person views images on the Internet rather than a disk or other memory device, the result is the same. The person is in control and calls up images on the screen for personal use. The user has control over whether to display the images and to save, print or otherwise deal with the images. Therefore, it may be inferred the [accused] viewed the images based on the presence of the icons "Lolita Porn" and "Lolita XXX" in the favourites on his computer, i.e., constructive possession; and from which one could reasonably conclude, based on the contents of paras. 3, 12, 13 and 16 of the Information, that the computer would afford evidence of the crime of possession of child pornography. [para. 40]

And further:

> … To obtain a search warrant there must be some basis for the authorizing justice to be satisfied on the element of possession. In the instant case, since no one observed actual child pornography images on the [accused's] computer, did the Information and evidence amplifying the statements in the Information indicate sufficient control by the [accused] to infer that he was in possession of child pornography so as to permit issuance of the search warrant?
>
> The Information states [the technician] observed the icons on the desktop and the web-cam hooked up to a VCR pointing to the floor where the children's toys were located, raised a concern for [the technician]. All this was changed the next day. During the voir dire, [the technician] testified that part of his job was to service computer servers at schools to create software so that children could be prohibited from accessing pornographic websites. To do so he would personally check websites to check for pornographic content. He was aware the icons "Lolita Porn" and "Lolita XXX" were terms for child pornography. [He] testified that the computer user had to purposefully add the icons to a computer desktop. [Two other police specialists in the field of child pornography] provided [the investigating officer] with information about the storage of images on a computer and the habits of persons interested in child pornography which were adequate to form the basis of reasonable grounds to infer that such images would be stored in the computer and related equipment. From this it is reasonable to infer the [accused] had control sufficient to satisfy the criteria of constructive possession, within the meaning of s. 4(3) of the Criminal Code, to sustain the issuance of search warrant.
>
> Therefore, on the basis of the whole of the evidence stated in the Information, as amplified by the

"[O]bserving the icons only, without viewing child pornography, was sufficient to conclude there were reasonable and probable grounds to conclude the [accused] was in possession of child pornography and a reasonable probability the seizure of the computer would afford evidence with respect to the commission of an offence."

> testimony at the voir dire, there is no basis to interfere with the trial judge's conclusion that observing the icons only, without viewing child pornography, was sufficient to conclude there were reasonable and probable grounds to conclude the [accused] was in possession of child pornography and a reasonable probability the seizure of the computer would afford evidence with respect to the commission of an offence. [paras. 45-47]

The warrant was valid and the accused's conviction appeal was dismissed.

### A Dissenting Opinion

Justice Richards disagreed with the majority. In order for a warrant to be lawfully issued, the justice must be satisfied the facts established reasonable grounds for believing the accused's computer, at the time the warrant was issued, contained images of child pornography. In his view, the totality of the circumstances, at most, raised a suspicion the accused might be in possession of child pornography but could not support a reasonable belief that his computer contained such material. As a result, the accused's rights under s.8 of the *Charter* were breached and Justice Richards would have excluded the evidence under s.24(2) and quashed the conviction.

Complete case available at www.canlii.org

## ROADSIDE DOG SNIFF UNLAWFUL FOR LACK OF REASONABLE SUSPICION

**R. v. Slater & Paul, 2008 ABPC 139**

A police officer pulled the accused's vehicle over on the Trans Canada Highway at 3:30 am for weaving in its lane and wanted to see if the driver was impaired. But the driver was sober. However, the officer noticed the truck had a fuel tank in its open back and that there were irregularities with respect to it. After asking questions of both the driver and passenger about the length of their trip, and receiving different responses, he suspected that they were transporting drugs. He removed both accuseds from the truck and then brought out a drug dog that always accompanied him on highway patrols. After the dog reacted to the fuel tank, the officer arrested both accuseds. He then opened up the fuel tank and found marijuana. The vehicle was towed to the police station and a warrantless search of the tank revealed 129 bags, each containing one pound of marijuana.

At trial in Alberta Provincial Court the judge found the accuseds rights had been breached.

### Improper Questioning

The judge found the question asked of the driver about the length of the trip was valid since the officer was concerned that the length of the drive might have left the accused Paul too tired to drive properly. However, when he asked the passenger Slater about the length of the trip the question was not related to driving and the nature of the investigation changed. This began the start of an investigation into possible drug trafficking which could not be justified under s.1 in the absence of s.10 *Charter* rights being given. Judge Barley stated:

> An extension of the purpose of the question puts the detention in another realm, one that is covered by the Charter. The accused Slater was standing by the side of the road in the middle of the night, because he had been ordered to by the officer. It was unrealistic to say that he could leave, because the vehicle in which he had arrived was not in a position to go anywhere. Although he did not testify as to any feeling of psychological restraint, the fact of being pulled over and being told to stand away from the vehicle in the middle of the night in the middle of a largely unpopulated area, is clearly a detention. The accused should have been told of his right to counsel, and of the new reason for detention before he was asked to incriminate himself by answering a question of great significance to a drug investigation, though of no significance to a traffic stop. [para. 22]

He ruled the answer provided by the accused Slater resulted directly from a s.10(b) violation, was conscriptive evidence, and was inadmissible under s.24(2).

### The Dog Sniff

A dog sniff for drugs constitutes a search and is only permissible when the officer has a reasonable suspicion that evidence of an offence would be discovered. A significant part of the officer's grounds for suspicion was the difference in the answers of the accuseds as to how long they had been away. But since the accused Slater's response was inadmissible, the

judge had to determine whether there were sufficient grounds remaining to justify the dog sniff of the tank. In finding the irregularities noted by the officer respecting the fuel tank did not objectively support a reasonable suspicion that an offence involving drugs was being committed, Judge Barley stated:

> The tank was clearly not industry standard, being too large, improperly painted, with an improper relief valve, with an inaccurate placard, and improper fastening. These are all concerns under a Dangerous Goods investigation.
>
> However, none of them point to the tank being used to transport something other than fuel. There was no evidence that this tank could not have been used to carry fuel. The fact that regulations might be violated show a lack of attention to detail.
>
> These errors do not seem to be anymore likely to be made when the intention is to put drugs in the tank, and not fuel. [paras. 28-30]

The dog sniff was an unreasonable search under s.8 and without the results of the dog's reaction there were insufficient grounds to further detain the accused or to arrest them. And "without grounds for further detention or arrest, the officer did not have grounds to search the fuel tank, either by the roadside or at the detachment," said Judge Barley. "These searches are in turn a violation of Section 8 of the Charter, as a warrantless search that is not saved by the authority to search incidental to arrest." The evidence was excluded under s.24(2).

Complete case available at www.albertacourts.ab.ca



## CANADIAN ADULT CRIMINAL COURT STATISTICS RELEASED

Statistics Canada recently released its report entitled *"Adult Criminal Court Statistics, 2006/2007"* Highlights include:

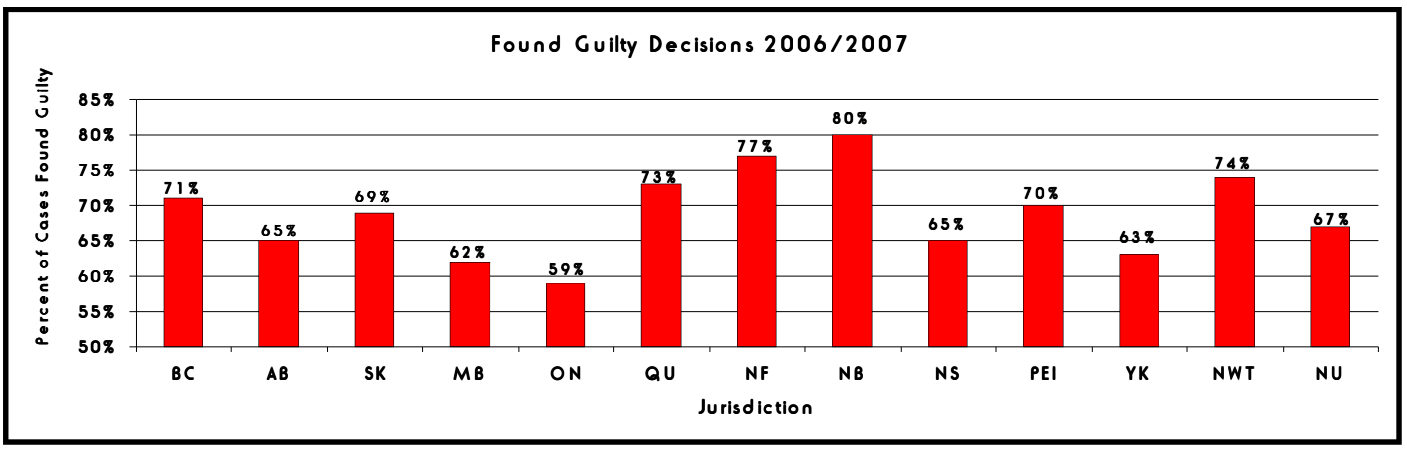
- In 2006/2007 there were 372,084 cases involving 1,079,062 charges;
- In cases where gender was recorded, 78% were male, 16% female, 6% no gender was recorded, and less than 1% involved a company;

**Top 10 Most Frequent Offences in Adult Criminal Court 2006/2007**

| Offence | % of total cases |
|---|---|
| Impaired Driving | 11.2% |
| Common Assault | 10.9% |
| Theft | 10.1% |
| Fail to Comply with Order | 7.3% |
| Breach of Probation | 7.2% |
| Major Assault | 5.1% |
| Uttering Threats | 4.4% |
| Fraud | 4.1% |
| Drug Possession | 3.8% |
| Possess Stolen Property | 3.6% |

- Nationally, the conviction rate (found guilty decisions) was 65%, while 30% of the cases were stayed or withdrawn and only 4% involved acquittals.

Source: Statistics Canada, 2008, Adult Criminal Court Statistics, 2006/2007, Catalogue no. 85-002-X available at www.statcan.ca



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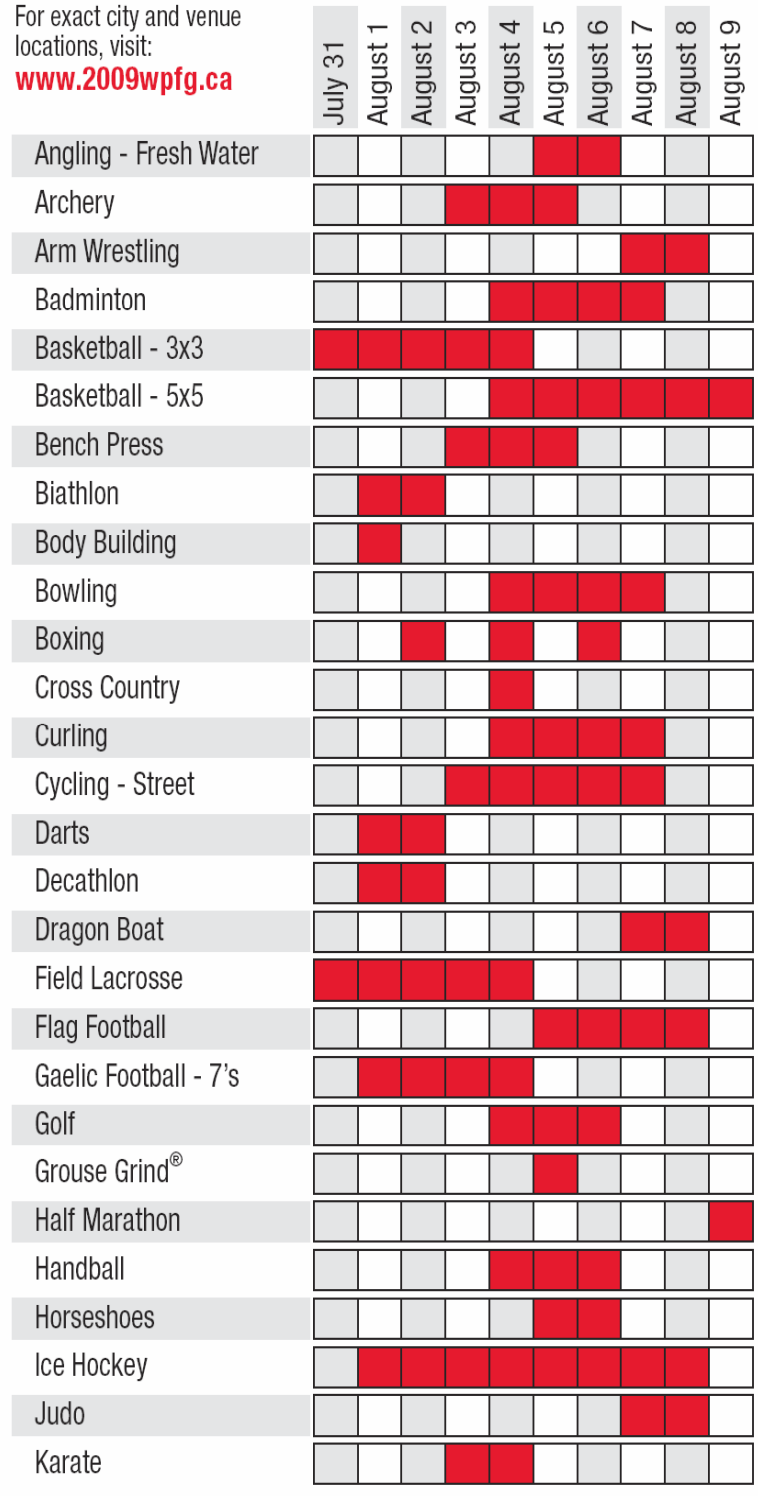


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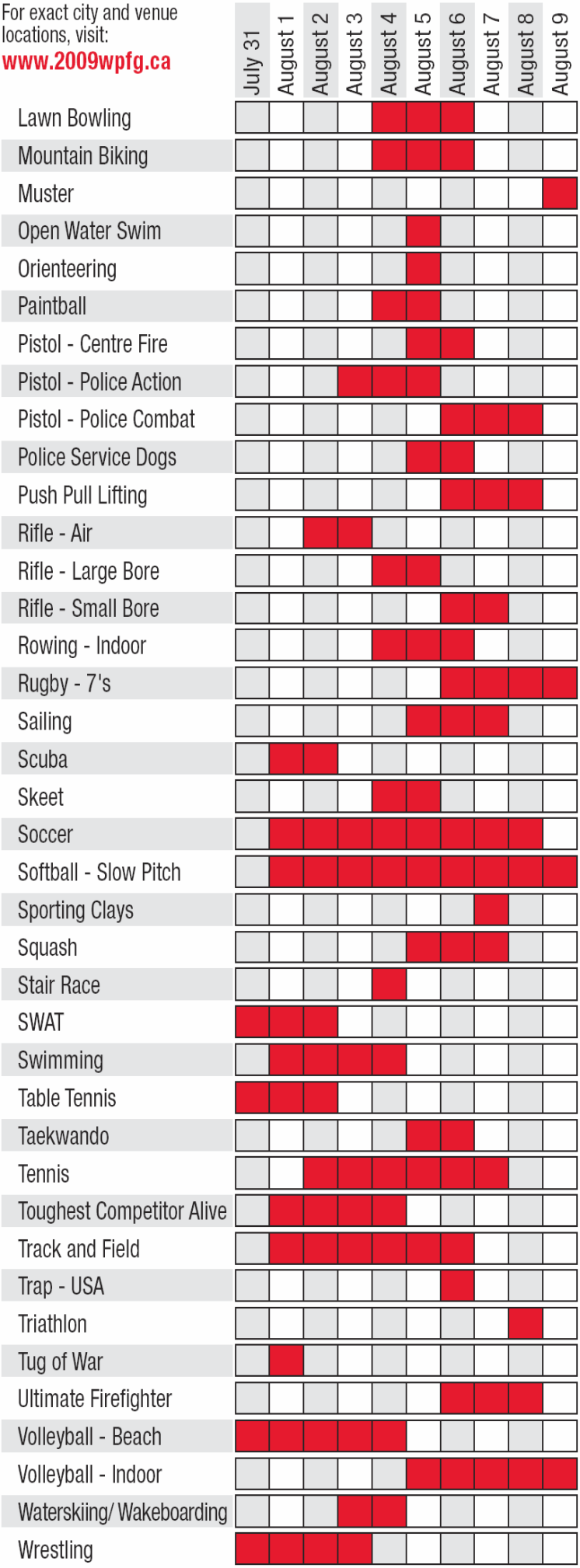



*Schedule subject to change.*

# TRAINING DILEMMAS: QUESTIONS & POSSIBLE SOLUTIONS

**Insp Kelly Keith, Atlantic Police Academy**

In combat sports men do not fight against women. There are weight classes in gender specific combat sports. There are rules, referees, and timed rounds. Fighters train to fight and are attacked spontaneously.

In fact, the Athletic Commissions in Mixed Martial Arts are currently reviewing the weight classes as there is a belief that there needs to be closer weight classes due to the advantages of being a larger opponent. In some weight classes we are only talking a 15 pound difference. In policing however, we can often have a hundred pound difference!

Are law enforcement officers trained to defeat a much larger, stronger, and more experienced fighter who spontaneously attacks them?

## Learning Environment Dilemma

Can a law enforcement officer learn a technique if they are learning the basics under duress? For example, when learning an escape from mount manoeuvre with a 205 pound male recruit in a mount position on a 140 pound female recruit is any learning going to realistically happen?

Possible Solution: Ensure that the learning environment is conducive to learning. The basics of the techniques must be taught in a learning environment that allows learning to be done! Once basics are learned, they must be introduced to reality training!

## Training Dilemma #1

Law enforcement officers are spontaneously assaulted most of the time. Are you trained and ready for this?

Possible Solution: When running drills or doing training, the subject should (the majority of the time) come at the officer, not visa versa. For example, in baton drills the training should centre around the officer and subject standing at interview distance. The subject should then approach the officer. The officer should then move off the line of attack, deploy their baton, and strike the bag. Or the officer may have the baton already drawn and strike the attacking subject. This greatly reduces the chance of a larger opponent getting their hands on a smaller officer.

## Training Dilemma #2

Does your training fly in the face of reality? For example, are trainees standing still on the range, extending arms, closing an eye, slowly pulling the trigger and utilizing breath control and/or flinching into an attack versus reality, which is flinching away from an attack.

Possible Solution: Once you have trained or are trained, see if what was preached truly works. Reflect what the statistics report and provide a deadly force assault within the 5 foot range where most deadly attacks occur. Then see if the firearms training applies. Or lurch at a student in the hallway when he is not expecting it and see if he flinches inwards or outwards no matter how he was trained.

## Physical Training Dilemma

Most law enforcement officers train in the gym as if they were bodybuilding, which has little to do with how a fighter trains, who I might add generally looks just as good. Slow deliberate movements with a weight or isolation exercises are not conducive to preparing you to win a confrontation. Transferring the strength exercises from one body part to another, like we MUST do in a confrontation, is far better.

Possible Solution: Utilize exercises such as the clean and jerk, dead lift, snatch, squat and bench press for strength. Ensure plyometrics are incorporated into your work-out. Develop power by moving weight through a range of motions quickly. Concentrate on rotational power through your core and go hard in the gym with little rest time between sets.

## Instructor Techniques Dilemma

Are the techniques being taught what is actually best for the officer or best for the instructor? If your instructor is a male and generally stronger than the opponent are the techniques being taught reflective of this, or will they work for a smaller officer?

Possible Solution: Ensure that what you are learning or teaching is the most suitable technique for the trainees size and strength and their own abilities. Just as instructors have different abilities, we should not try to create internal conflict in a student with what comes natural to them. If we have someone that is already a good kicker at the "striking range" this is what that person's techniques should be based around. Each law enforcement officer should understand where their strengths are and how to utilize those strengths. Be it re-action time, agility, lateral movement or strength.

## What Tool At What Range Dilemma

It is generally easy for law enforcement officers to understand that if a subject is assaultive, and all things being equal, O.C. Spray may be an appropriate weapon to use. However, if statistics reveal that we are generally assaulted spontaneously and most assaults are with a subject's body parts (hands/feet, etc.), each officer must understand that getting to their O.C. Spray while under physical attack and being hit is generally not the best action. They must make space to get to their O.C. spray generally from a close quarter confrontation range. This means using close quarter weapons to get this space.

Possible Solution: The four fighting ranges - posturing, striking, close quarters and ground control - generally require different weapons. Each officer should fully understand what weapons apply at each distance with an assaultive or potentially assaultive person.

- Posturing – the officer should be ready to use an appropriate weapon;
- Striking – this is hand and feet striking range;
- Close quarter – this is elbows and knees;
- Ground control – understand how to defend against going to the ground. And if you are on the ground, understand limitations and how to escape and get to your feet.

## To Hit or Not To Hit Dilemma

If law enforcement officers are trained in control tactics and only hit bags, we all know that they are not any better trained than the hockey player that is only trained to skate and then thrown into a hockey game with no other skills. However, if there are injuries in control tactics training there are complaints. And if there is force on force that is not done properly, there can be major training scars created!

Possible Solution: Force on force must be used. However, it must be introduced gradually so that the students are prepared for it. Stress inoculation is not just a catchy phrase. It is effective and can be used to prepare officers for the reality of getting attacked on the street.

## Conclusion

There is no such thing as "one size fits all" training. Different people should have different tools in their toolbox. If it is not realistic in the real world for a small officer escorting a 230 pound male subject to do an arm bar take-down. Training should not reflect this. Most times this is NOT the option that we want a small officer to do. Let's be honest, this won't work most times if the male subject is a mean, pain tolerant individual. One last thing that cannot be overlooked in training is understanding pre-assaultive cues which can allow us to be ready to win before we are into the confrontation!

**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

# ROADSIDE VEHICLE SNIFF UNREASONABLE

**R. v. Bramley & Schiller, 2008 SKPC 82**

Two police officers pulled over a vehicle along the Trans Canada Highway. The accuseds vehicle drove by at a speed well above 60km/h. Saskatchewan's *Traffic Safety Act* (s.204) requires motorists to slow their vehicles to 60km/h when passing an emergency vehicle with lights flashing. The vehicle was stopped and the driver, accused Bramley, produced a British Columbia photo driver's licence and a rental agreement for the vehicle in a female's name that did not authorize an additional driver. The accused Bramley explained he couldn't afford to rent the vehicle so he had his wife put it on her credit card. He also told police that he and Schiller were going to visit friends in Regina. The accuseds appeared quite nervous to police. Bramley would make eye contact and then look away and had a nervous giggle while Schiller did not make any eye contact and looked "odd" with his long hair all tucked up under his ball cap, perhaps trying to conceal his identity. A CPIC check showed both accuseds had prior convictions for drug offences including possession for the purpose of trafficking.

The accuseds were detained in the back of a police car on suspicion of trafficking narcotics, advised of their rights to counsel, and given the police warning. Neither wanted to speak with a lawyer. A drug detector dog was called to the stop, circling the vehicle and sitting at its rear. This was a positive indication and the men were arrested for possessing narcotics. They were again advised of their rights to counsel and given the police warning. The trunk of the vehicle was opened and a large black suitcase, a knapsack, and a smaller duffle bag were located. In these bags police found drugs resulting in charges of unlawfully possessing cannabis resin and marihuana for the purpose of trafficking.

At trial in Saskatchewan Provincial Court the officers testified they regularly worked together patrolling major highways in an effort to rigorously enforce traffic and highway driving laws and in doing so, attempted to closely watch for the movement of any contraband or any other illegal activity. One of the officers also said the accuseds' nervous behaviour, criminal records, third party rental vehicle status from British Columbia, and his training and experience as a police officer that people haul and smuggle drugs using third party rental vehicles lead him to suspect that the men were in possession of a controlled substance, transporting it from British Columbia to Regina. He therefore decided to detain them to further the investigation. The accuseds argued their rights under ss. 8 and 9 of the *Charter* had been breached.

## Detention

In this case, Judge Kovatch found the initial stop of the vehicle was lawful:

> [T]he officers had reasonable grounds to believe that an offence had been committed under The Traffic Safety Act of Saskatchewan in that the accused passed the police vehicle, with emergency lights engaged, at a speed greater than 60 km per hour. Under s. 209.1 of The Traffic Safety Act, the officers had the legal right to stop the accused's vehicle, and to require the driver, Mr. Bramley, to produce identifying information. However, … police powers allowed and justified under The Traffic Safety Act will be restricted in their use to investigation and enforcement of matters under that Act. In other words, and in terms of this case, the Crown could not assert a right to search this vehicle because the accused had been detained under the provisions of The Traffic Safety Act. It is clear that any investigative detention and search of this vehicle must stand or fall solely on the basis of the information that the police acquired after the stop of the vehicle and whether they had grounds for a detention or a search under the provisions of the Criminal Code and the common law. [reference omitted, para. 14]

However, the further detention related to the drug investigation beyond the initial reason for the stop could not be justified and amounted to an arbitrary detention. In order for an investigative detention to be lawful the police must have reasonable grounds to detain, which is a lower threshold than reasonable and probable grounds for lawful arrest. But an officer's hunch is not sufficient. Reasonable grounds to detain requires "a constellation of objectively discernable facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation". In holding that the police officers had no reasonable grounds for the investigative detention, thus

rendering the accuseds' detentions arbitrary and unlawful, Judge Kovatch stated.

> [T]here was nothing… to give [police] a reasonable basis to conclude that any criminal offence had been committed or that these individuals were involved in any criminal activity. [T]he officers saw individuals who bore a number of similar characteristics, or bore a similar profile to the profile shown to the police officers in their training courses. In my view, however, it cannot be said that the identification of the similar characteristics or similar profile gives reasonable grounds to detain. The reason is simple. While all, or a large number, of criminals may exhibit certain characteristics, it cannot be said that all or even a significant number of individuals displaying such characteristics are criminals. For example, while a substantial number of drug couriers may use vehicles rented by third parties, I very much doubt that a significant percentage of individuals that may drive a rented vehicle, or a vehicle rented by a third party, are involved as drug couriers. The only additional factor identified by the officer was that both accused displayed some nervousness. In my view, some nervousness shown by individuals, when stopped by police, is normal. This factor is not sufficient to change my assessment that the officers did not have reasonable grounds to detain. [para. 19]

### Search and Seizure

Since there was no legitimate investigative detention but an arbitrary one, the search of the accused's vehicle and property pursuant to an unlawful or arbitrary detention was also unlawful. The search was not validly conducted as one incidental to the arrest because no arrest had been made until after a search had been conducted by the sniffer dog. Also, in light of the recent Supreme Court of Canada judgments on police sniffer dogs (in *R. v. Kang-Brown* and *R. v. A.M.*), the Crown failed in its argument that the sniffer dog was only employed as an investigative tool and its use did not amount to a search because it merely examined air space adjacent to the accused's car. Although the positive sit by the sniffer dog, which gave police reasonable grounds for arrest, did not require prior judicial authorization, it did require a "reasonable suspicion". Here, the reasonable suspicion test was not met. A reasonable suspicion is lesser than reasonable and probable grounds, but still has an objective component. "There must be objectively ascertainable facts upon which the Court can conclude that there was a reasonable suspicion," said Judge Kovatch. He continued:

> In this case as in Kang-Brown, the police officers identified a number of characteristics that were similar to the profile given to the police during their specialized training. Here, as in Kang-Brown, the police officers determined that the accused were very nervous. In both cases, there was little other than the profile similarities and nervousness on the part of the accused, to justify or ground the police actions. In short, in my view, this case is indistinguishable from the Kang-Brown decision, and I must determine that there was no reasonable basis for the search by the sniffer dog and as a result the search by the sniffer dog was conducted contrary to s. 8 of the Charter. Clearly the subsequent search of the vehicle and the suitcases contained in the trunk of the vehicle must be simply an extension of the initial search by the sniffer dog. As a result, the entirety of the search must be found to be unreasonable and contrary to s. 8 of the Charter. [para. 24]

The evidence was excluded under s.24(2).

Complete case available at www.canlii.org

## ACTING IN COURSE OF DUTIES A WIDE TERM

**R. v. Jaw, 2008 NUCA 02**

The accused had been living in common-law when his spouse told him to leave her home. Instead, he tried to reconcile with her. As the situation began to deteriorate, the accused's spouse called police and told the 911 operator that she wanted the accused out, but he refused to go and that she feared the situation may worsen and become physical. During this call, the accused retrieved his shotgun and racked it to demonstrate it was loaded. That caused a live round to eject, which the accused then placed back in the gun before returning it to the closet.

R.C.M.P. Cst. Jergen Seewald, in police uniform, attended the residence During the encounter the accused alleged the officer pushed him down into a chair and used pepper spray on him. At some point, the accused went to the closet, retrieved the shotgun, and the officer was fatally shot. The accused left the residence without checking on the wounded officer,

Cst Jergen Seewald

who was still alive and in obvious distress, but turned himself in the following day.

At trial in Nunavut Supreme Court the accused submitted, in part, that the officer's force was excessive, hence he was not in the course of his duties, or engaged in a lawful arrest, so resistance would not be unlawful. Thus, the killing would not be first degree murder of a peace officer on duty even though the accused knew Cst. Seewald was a peace officer. Crown, on the other hand, disputed the contention that Cst. Seewald used excessive force, such as to take him out of the course of his duty and argued that such a defence to first degree murder ought not be put to the jury.

The trial judge concluded that excessive force, even if shown, could not remove the definitional element of acting in the course of a peace officer's duty in a first degree murder offence. He ruled the jury should not be asked to decide whether the officer, in allegedly pushing the accused down into a chair and using pepper spray, had used force to such a degree as to find him no longer acting in the course of his duty. "As a matter of law, the unjustified use of force by a police officer, short of raising an issue of self-defence, or, indeed, an issue of provocation, does not affect the applicability of Section 231(4)(a) of the Criminal Code," said the trial judge. "In plain terms, even if Constable Seewald committed an assault, he was still acting in the course of his duties, and Section 231(4)(a) still applies."

The accused was convicted by a jury of first degree murder in the shooting. He then challenged his conviction, again arguing, among other grounds, that the jury should have been instructed that killing the officer might be second degree murder if they found that Cst. Seewald used excessive force in dealing with the accused, on the basis that the officer was no longer acting in the course of his duty when the shooting occurred. In his view, the officer may have been acting in the course of his duties when responding to the 911 call, but when he stepped into the apartment without the accused's permission, or when he used pepper spray, he had stepped beyond the scope of his authority and was no longer "acting in the course of his duties" when he was shot.

## BY THE BOOK:

s.231(4) *Criminal Code*.


Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the victim is

(a) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff's officer or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties;
(b) a warden, deputy warden, instructor, keeper, jailer, guard or other officer or a permanent employee of a prison, acting in the course of his duties; or
(c) a person working in a prison with the permission of the prison authorities and acting in the course of his work therein.

Section 231(4)(a) of the *Criminal Code* makes the killing of a peace officer acting in the course of their duties first degree murder regardless of whether it was planned or deliberate. Acting in the course of duty, however, does not incorporate elements of "execution" of duty by applying a requirement of "lawful" to "course".

The Nunavut Court of Appeal found the accused's argument failed on the basis of the law. The meaning given to "course" of duties is temporal and a wide term. It not only includes activities covered by the narrower term "engaged in the execution of his duty", said the Court, citing *R. v. Prevost*, (1988) 42 C.C.C. (3d) 314, "but also includes 'any activity which is related to the performance of a duty or to the ability of the officer to perform his duty. Thus, refueling the cruiser, having lunch, attending to one's toilet necessities, receiving medical attention, or similar activities during a tour of duty would all fall within this definition'."

Here, the accused tried to narrow the definition of the "course" of duty to cover only that which an officer might lawfully do during his shift. But the test

is not to look "at whether a specific authority of the officer was being lawfully executed at the time of his death, but whether the officer was an officer in the legal sense of acting in the course of his duties when murdered." Justice Watson stated:

> The venerable strict construction concept does not assist the [accused] here. On its face, the word "acting in the course" connotes temporal connection in a neutral sense. It is not in that sense ambiguous such as to attract a narrowing of that meaning. To add, as does the [accused], a requirement that the Crown prove beyond a reasonable doubt not merely that the officer was acting in the course of his duty but specifically executing a cognizable legal duty in a lawful manner, exceeds the wording of the Code. [references omitted, para. 64]

The Court also looked to the French language version of this *Criminal Code* provision to ascertain the common meaning in context:

> In my view, the common meaning, in their grammatical and ordinary sense, of the words two linguistic versions of s.231(4)(a) of the Code read in their contexts is that the concept of "acting in the course" of duty is a temporal concept, referring to the officer being then on duty. Arguably, an officer might, even if "off-duty" to begin with, embark upon a course of conduct which also would mean he is "acting in the course" of his duty, but it is not necessary to discuss that point. Moreover, this case does not raise any issue of the [accused's] mens rea in connection with the status of Cst. Seewald. Accordingly, that potential limiting effect on the extent of application of a temporal interpretation of s.231(4)(a) of the Code also need not be discussed.
>
> Cst. Seewald arrived in the course of his duty here and, plainly, continued to pursue the purpose of his arrival as associated with that duty. He did not lose his temporal status of being "on duty" by allegedly exceeding the execution of a lawful authority. Cst. Seewald's dying remarks may have reflected some doubt on his part as to how he handled the situation. That evidence was not meaningful in relation to what his status was as one cannot say what he was thinking about.
>
> The scheme of this provision, reflecting the overall intent of Parliament, is to enhance the deterrent and denunciatory effect of punishment for murder of police officers on duty, regardless of what they are specifically doing. This policy must have regard to the police taking on (as here) the dangerous function of public protection and of keeping the peace in circumstances where the rest of us can retreat and not be second-guessed about specific policing techniques after the fact. [references omitted, paras. 68-70]

Further, it could be very complicated to try to "divide a mosaic of events with a view to reducing the quality of the murder committed for sentencing purposes." For example, deciding whether a deceased officer violated some internal directive, who fired the first shots, or what the subjective opinion of a police officer was as to their relevant authority can be difficult:

> In other words, discussions of legality of police action could involve objective and subjective inferences about both conduct and state of mind. Apart from the complexity of such an investigation by the jury, it would be difficult to differentiate such an exercise from amounting to a post-facto police fault inquiry quite distinct from determining any relevant legal defence for the defendant. … If [defences such as self-defence or provocation] arise, their legal effect would be unimpaired by a temporal definition to s. 231(4)(a) of the Code. If they do not arise, there would be no clear purpose to contradicting the intent of Parliament to treat the murder of police officers differently for sentencing purposes. … [para. 72]

The accused's appeal was dismissed.

Complete case available at www.canlii.org

"The scheme of this provision ... is to enhance the deterrent and denunciatory effect of punishment for murder of police officers on duty, regardless of what they are specifically doing. This policy must have regard to the police taking on ... the dangerous function of public protection and of keeping the peace in circumstances where the rest of us can retreat and not be second-guessed about specific policing techniques after the fact."

## BC CHANGES ACCIDENT REPORTING LEGISLATION

In *R. v. Powers*, 2006 BCCA 454, British Columbia's Court of Appeal ruled that an accused's admission to a police officer given under compulsion of s. 67 of BC's *Motor Vehicle Act* (*MVA*) that he was the driver of a motor vehicle involved in an accident breached his s.7 *Charter* right against self-incrimination and was inadmissible. Without the admission the officer was unable to establish a reasonable suspicion for an approved screening device demand under s.254(2) of the *Criminal Code*, which the accused had failed and was ultimately relied upon for a formal breathalyzer demand under s.254(3), and which showed a blood-alcohol concentration over 80mg%. Since the Crown was unable to establish that the officer had reasonable grounds to make the breathalyzer demand, the accused's acquittal on an over 80mg% charge was upheld.

Section 67 was repealed and replaced by s.67.1. The new provision removes reference to reporting the accident to a police officer (see underlined text in table below). As well, s.68(1)(c) was amended by striking out "to a peace officer or", thereby removing the obligation on drivers to furnish information to a peace officer when requested. Similar amendments were made to the reporting and furnishing of information involving a bicycle accident under s.183 of the *MVA*.

# BY THE BOOK:


New s. 249 *Motor Vehicle Act*:

Part 8 – Police Accident Reports
Accident reports by police officer

(1) If
(a) a vehicle driven or operated on a highway directly or indirectly causes death or injury to a person or damage to property causing aggregate damage apparently exceeding a prescribed amount, or
(b) an accident involving the presence or operation of a cycle on a highway or a sidewalk directly or indirectly causes death or injury to a person or damage to property causing aggregate damage apparently exceeding a prescribed amount,

a police officer who attends the accident must complete a written report of the accident in the form established by the Insurance Corporation of British Columbia and forward it to the corporation within 10 days of the accident.

(2) A person involved in an accident referred to in subsection (1)(a), or that person's authorized representative, is entitled to obtain on request the names of any drivers involved, the licence number, the name of the registered owner of any motor vehicle involved and the name of any witness.

### Accident Reports and Duty on Driver

| | |
|---|---|
| **Old s.67(1)** If a vehicle driven or operated on a highway, either directly or indirectly, causes death or injury to a person or damage to property causing aggregate damage apparently exceeding the amount set out in subsection (2), the person driving or in charge of the vehicle must<br>(a) report the accident to a police officer or to a person designated by the Insurance Corporation of British Columbia to receive those reports, and<br>(b) furnish the information respecting the accident required by the police officer or designated person. | **New s.67.1(1)** If a vehicle driven or operated on a highway directly or indirectly causes death or injury to a person or damage to property causing aggregate damage apparently exceeding a prescribed amount, the driver of the vehicle must within the prescribed period of time after the accident report the accident, in the form established by the superintendent, to the person or public body identified in the regulations for this purpose. |
| **Old s.68 (1) (c)** The driver or operator or any other person in charge of a vehicle that is, directly or indirectly, involved in an accident on a highway must do all of the following ... (c) produce in writing to any other driver involved in the accident and to anyone sustaining loss or injury, and, on request, to a peace officer or to a witness (i) his or her name and address ... or such of that information as is requested. | **New s.68 (1) (c)** The driver or operator or any other person in charge of a vehicle that is, directly or indirectly, involved in an accident on a highway must do all of the following ... (c) produce in writing to any other driver involved in the accident and to anyone sustaining loss or injury, and, on request, to a witness (i) his or her name and address ... or such of that information as is requested. |

# CITIZEN'S 'INVESTIGATIVE DETENTION' NOT SUBJECT TO *CHARTER* SCRUTINY

**R. v. Asp, 2008 BCSC 794**

A private security guard became suspicious after the accused left a hotel in the middle of the night with his luggage and some bags through an emergency exit without informing the front desk. The guard called 911 but the operator told him that following another vehicle was not condoned and not to get out of his vehicle. The guard began to scream and said "Hey, guys, please", referred to his location, and then the phone went dead. Police attended the scene and observed the guard and the accused struggling with each other. The guard was attempting to detain the accused. During the altercation, the accused's vehicle had rolled forward and struck a pole, dislodging the lid of a box in the back seat. When police looked into the vehicle they saw plastic bags of marijuana in the box and a can of bear spray on the ground beside the guard's vehicle, which the police seized. The police arrested the accused and his female companion for possessing a controlled substance. His vehicle was towed to the police station where it was searched without a warrant and marijuana, in 54 zip-lock bags, weighing 13.59 kg., was seized. The accused was charged with possessing marihuana for the purpose of trafficking under s. 5(2) of the *Controlled Drugs and Substances Act*.

During a *voir dire* in British Columbia Supreme Court the accused sought to have the marihuana seized from his vehicle excluded as evidence under s.24(2) alleging his *Charter* rights under ss. 7, 8, and 9 were breached. The accused argued the *Charter* applied to the actions of the security guard making a citizen's arrest because he was government within the meaning of s.32. And moreover, the police could have obtained a search warrant but chose not to. Since the accused's rights were breached, the marihuana should have been ruled inadmissible. The Crown, on the other hand, contended the facts did not establish that there was a citizen's arrest and, even if there was one, the *Charter* did not apply to a citizen's arrest because the security guard was not performing a government function.

## Government Test

In this case, Justice Arnold-Bailey found the *Charter* did not apply to the actions of the security guard. First, the guard was not making a citizen's arrest under s.494 of the *Criminal Code*. The mere fact the guard touched the accused and used some force with a view to his detention was not enough to establish the start of a citizen's arrest. An arrest is a continuing act and the evidence was unclear about whether the guard was going to briefly detain the accused and let him go if he found nothing incriminating, or whether he planned to deliver him to the police. And just because force is used, whether by a security guard or a police officer, does not necessarily elevate a detention to an arrest. Since this was not a citizen's arrest there was no reason to determine whether it could be construed as state action for *Charter* purposes, which, in the court's view, remained an open question.

Second, even if *Charter* protection applied to citizen's arrests, it does not extend to an investigative detention by a private person. "If the security guard's actions in relation to the [accused] were to amount to an investigative detention, as opposed to a citizen's arrest, the Charter does not apply," said Justice Arnold-Bailey. "To the extent the activities of the security guard constituted an investigative detention the protection of the Charter is…not available to [him]."

Since the actions of the guard were not subject to *Charter* scrutiny he did not breach the accused's rights and therefore there was not a sufficient nexus between the alleged violations and the police seeing and seizing the marijuana, rendering s.24(2) applicable.

## Police Action

A search or seizure under s.8 of the *Charter* will be reasonable if it is authorized by law (statute or common law), the law itself is reasonable, and it is carried out in a reasonable manner. When a search or seizure is undertaken without a warrant it is *prima facie* unreasonable and the Crown bears the burden of showing it was, on the balance of probabilities, reasonable.

Here the evidence was in plain view and the police were entitled to seize it. Justice Arnold-Bailey noted the following points:

1. The officers had lawful justification for their presence at the roadside. They were responding to a 9-1-1 call from the security guard who requested their assistance and then seemed to be in obvious difficulties;
2. The officers discovered the marijuana in [the accused's] vehicle inadvertently while performing their lawful police duty; i.e. investigating the physical altercation between the security guard and the [accused];
3. A significant quantity of marijuana was clearly in plain view, as it was exposed when the box in the back seat tipped and the lid fell off during the collision of [the accused's] vehicle with the pole. Thus, the marijuana could be seen in the box, tipped on its side, through the windows of the vehicle. [para. 50]

"For a search to be valid under the common law power of search incidental to arrest: (1) the arrest must be lawful; (2) the search must have been conducted as an "incident" to the lawful arrest; and (3) the manner in which the search was carried out must be reasonable."

And even if plain view did not justify the seizure a search incidental to arrest did. The police were entitled to search for and seize the marijuana from the vehicle after the accused's arrest for unlawful possession of a controlled substance even though (1) they believed they could have obtained a search warrant, (2) no exigent circumstances existed such that evidence in the vehicle might have been lost or destroyed had they waited and applied for a warrant, and (3) there was no risk evidence would have been removed from the vehicle while awaiting a warrant:

> For a search to be valid under the common law power of search incidental to arrest: (1) the arrest must be lawful; (2) the search must have been conducted as an "incident" to the lawful arrest; and (3) the manner in which the search was carried out must be reasonable.
>
> For a search to be truly incidental to arrest, the police must be attempting to achieve some valid purpose connected to the arrest. The three main purposes of search incident to arrest are ensuring the safety of the police and the public, the protection of evidence from destruction at the hands of the arrestee or others, and the discovery of evidence that can be used at the arrestee's trial.
>
> The power of search incidental to arrest extends to authorize the search of a motor vehicle driven by an arrested person. The right to search a car incidental to arrest and the scope of that search will depend a number of factors, including the location of the motor vehicle in relation to the place of arrest. Further, delay and distance from the place of arrest do not preclude a search from being incidental to arrest.
>
> In this case, the officers, having seen the marijuana in plain view, had reasonable and probable grounds to arrest the accused. Further … the police searched the accused's vehicle, which they found with the accused at the place of arrest, as part of a drug investigation, which is a valid purpose connected to the accused's arrest for possession of a controlled substance. Finally, there is no suggestion that search was carried out in an unreasonable manner. [references omitted, paras. 52-55]

"The power of search incidental to arrest extends to authorize the search of a motor vehicle driven by an arrested person. The right to search a car incidental to arrest and the scope of that search will depend a number of factors, including the location of the motor vehicle in relation to the place of arrest."

The seizure of the marijuana seen by the police in plain view, the subsequent search of the vehicle, and the further seizure of marijuana as a search incidental to arrest were proper and did not breach the accused's s.8 *Charter* rights. The marihuana was therefore admissible.

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

## s.8 BREACHED, BUT EVIDENCE ADMITTED ANYWAY

### R. v. Khan, 2008 ONCA 496

Police obtained a telewarrant to search the accused's home at night. At trial in the Ontario Superior Court of Justice the judge found a s.8 *Charter* breach but admitted the evidence under s.24(2). The firearm, ammunition, body armour and drugs found during the search resulted in the accused's conviction on a number of firearms and drug-related offences. He then appealed his convictions to the Ontario Court of Appeal arguing the trial judge erred by failing to exclude the evidence discovered during the search. In the accused's view, the violation was serious and the reputation of the administration of justice mandated the exclusion of the evidence under s. 24(2). But in a

unanimous endorsement, the Ontario Court of Appeal upheld the trial judge's ruling.

The evidence was real, non-conscriptive evidence and therefore the admission of it would not render the trial unfair. Nor was the *Charter* violation serious. The breach was not wilful or flagrant, nor did the police act in bad faith or in a deliberate disregard of the accused's rights. And the breach did not reflect institutional indifference to individual rights. Rather, the breach was "close to the line", inadvertent and unintentional. Given "the totality of the information provided to him, the justice issuing the warrant would not have been misled as to the credibility or reliability of the informant on whose tip the police relied in obtaining the warrant."

And even though the accused had a strong privacy interest in the search of his home at night, "the circumstances were urgent and the mode and timing of the entry to the [accused's] home were designed to ensure the safety of the police, the occupants of the home and the public":

> Information came to the attention of the police that the [accused] was in illegal possession of a firearm, ammunition and body armour, giving rise to what was a potentially serious risk of danger to the public. Given the genuine safety concerns that arose here for the police and the public, we agree with the trial judge that urgency existed and the time and method of entry to the appellant's home were justified. [para. 10]

And finally, in agreeing with the trial judge that the evidence should be admitted, the Appeal Court stated:

> The crimes charged were very serious and the impugned evidence was essential to the Crown's case. The non-conscriptive evidence at issue involved both a gun and drugs. The Charter breach was not serious and there is no suggestion that an unfair trial will result from the admission of the evidence. Having regard to all these factors, the exclusion of this evidence at the [accused's] trial would exact a great toll on the long-term integrity of the justice system. We agree with the trial judge that the effect of the exclusion of the evidence in this case would be more detrimental to the reputation of the administration of justice than would the effect of its admission. [para. 12]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

## BC's 25 Top Stolen Vehicles (2007)

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

Source: www.icbc.com

**DID YOU KNOW...**that Canada's motor vehicle theft rate was 443 per 100,000 population in 2007, down -8.8% from 2006. BC's rate was 619 while the Abbotsford Census Metropolitan Area (CMA) was 1,001, the Vancouver CMA 630, and the Victoria CMA 355. Manitoba had the highest motor vehicle theft rate at 1,236 with Winnipeg topping out the CMA rates at 1,714 stolen vehicles per 100,000. Source: Statistics Canada, 2008, Crime Statistics in Canada, 2007, Catalogue No:85-002-X

## 2007 CANADIAN CRIME STATISTICS

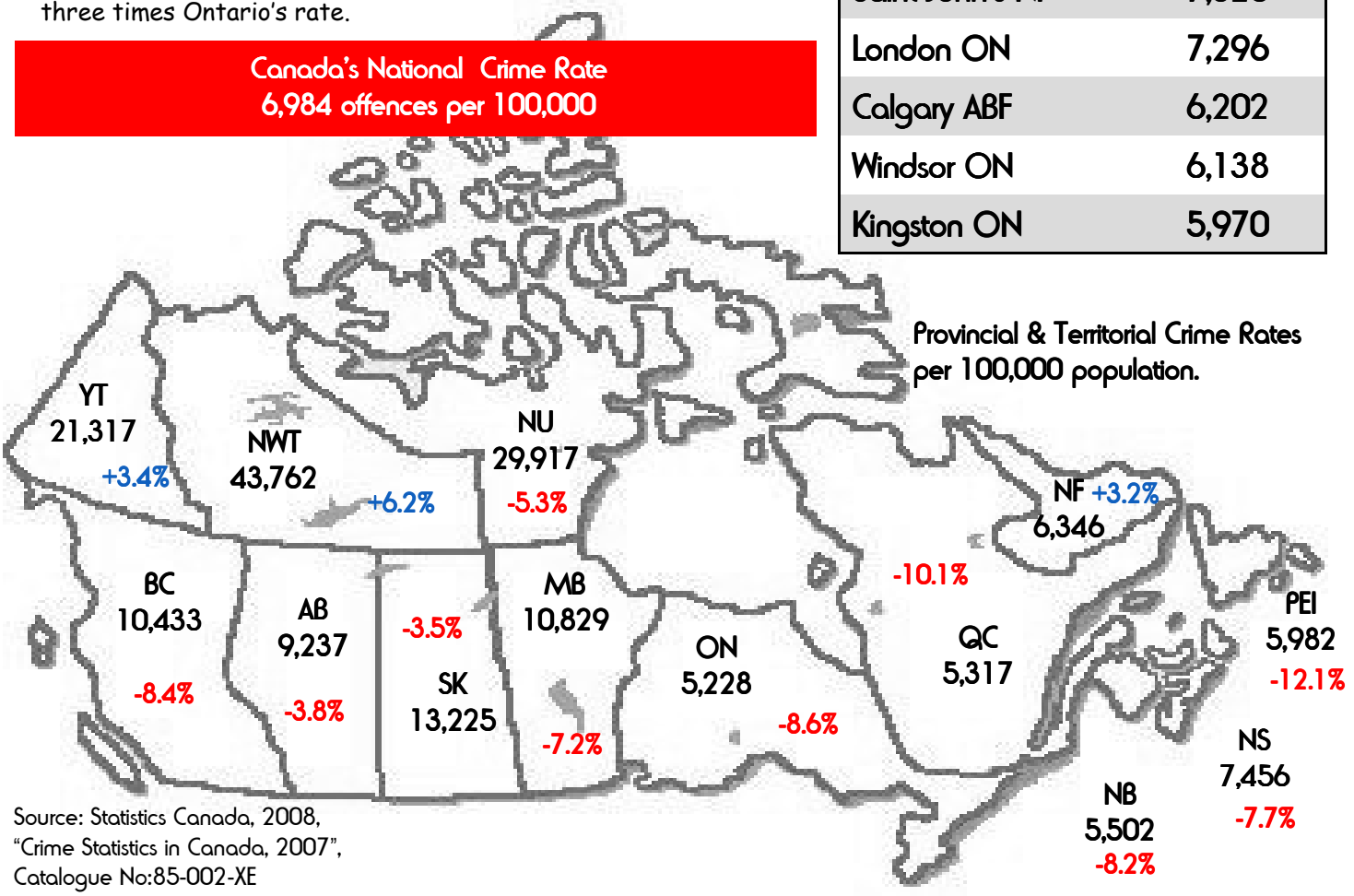
Statistics Canada recently released its report entitled *"Crime Statistics in Canada, 2007"*. Highlights include:

- National crime rate dropped by -7.4%. Violent crime was down -2.5%, property crime was down -7.7% and other *Criminal Code* incidents were down -8.6%.
- National homicide rate dropped by -3.0%.
- B.C.'s homicide rate dropped by -19.6%.
- Youth crime rate decreased -1.5%. Youth homicide rate dropped by -10.5%.
- Total drug offences increased by +2%. Marihuana offences increased by +4%, while cocaine offences rose by +0.9% and other drug offences, which includes crystal meth and heroin, rose by +6.5%.
- B.C. had the highest provincial drug offence rate at 654 per 100,000. This was more than twice the next highest rate (Saskatchewan at 286) and almost four times PEI's and Newfoundland's rate (142 and 169 respectively).
- Impaired operation rate (including over 80mg% and refusal) increased by +3.4% nationwide. The Yukon had the greatest increase at +49.4% followed by Newfoundland at +25.3%. Saskatchewan had the highest provincial impaired rate at 545 per 100,000, more than three times Ontario's rate.

**Criminal Code Crime Rates**
**for Census Metropolitan Areas (CMA)**
**2007 - Top 15**

| CMA | Crime Rate |
|---|---|
| Regina SK | 11,827 |
| Saskatoon SK | 11,560 |
| Abbotsford BC | 10,341 |
| Winnipeg MB | 9,644 |
| Edmonton AB | 9,572 |
| Victoria BC | 9,335 |
| Vancouver BC | 9,136 |
| Thunder Bay ON | 8,819 |
| Saint John NB | 8,292 |
| Halifax NS | 7,954 |
| Saint John's NF | 7,325 |
| London ON | 7,296 |
| Calgary ABF | 6,202 |
| Windsor ON | 6,138 |
| Kingston ON | 5,970 |

**Canada's National Crime Rate**
**6,984 offences per 100,000**




Source: Statistics Canada, 2008, "Crime Statistics in Canada, 2007", Catalogue No:85-002-XE

### Property Crime

Nationally, property crime dropped -7.7%. Every area saw a decrease in property crime with the Yukon (-14.5%), Nova Scotia (-12.5), and PEI (-12.0) seeing the largest drops.

**Property Crime Rates**
for Census Metropolitan Areas (CMA)
2007 - Top 5

| CMA | Crime Rate per 100,000 |
|---|---|
| Abbotsford BC | 5,868 |
| Regina SK | 5,703 |
| Edmonton AB | 5,166 |
| Vancouver BC | 5,100 |
| Winnipeg MB | 5,090 |

### Motor Vehicle Theft

Motor vehicle theft was down -8.8% nationwide, with the greatest decreases in Nova Scotia and the North West Territories (-23.3%). All other regions saw a decrease with the exception of PEI and Nunavut (+6.6% and +5.3% respectively).

**Motor Vehicle Theft (MVT) Rates**
for Census Metropolitan Areas (CMA)
2007 - Top 5

| CMA | MVT Rate per 100,000 |
|---|---|
| Winnipeg MB | 1,714 |
| Abbotsford BC | 1,001 |
| Edmonton AB | 832 |
| Regina SK | 735 |
| Calgary AB | 639 |

### Break and Enter

Break and enters also saw a decrease, down -9.0%. The Yukon had the largest decrease (-25.3%) followed by New Brunswick (-15.0%), Ontario (-11.0%), and the Northwest Territories (-10.4%).

**Break & Enter (B&E) Rates**
for Census Metropolitan Areas (CMA)
2007 - Top 5

| CMA | B & E Rate per 100,000 |
|---|---|
| Regina SK | 1,618 |
| Abbotsford BC | 1,263 |
| St John's NF | 1,028 |
| Winnipeg MB | 1,022 |
| Vancouver BC | 995 |

### Violent Crime

Violent crime in Canada was down -2.5%. This included homicide (-3.0%), attempted murder (-5.1%), robbery (-4.7%), sexual assault (-4.5%), and assault (-2.5%). Nunavut saw the greatest increase in homicide (+242%) followed by Manitoba (+57.9%) and New Brunswick (+14.2%).

**Homicide Rates**
for Census Metropolitan Areas (CMA)
2007 - Top 5

| CMA | Homicide Rate per 100,000 |
|---|---|
| Saskatoon SK | 3.6 |
| Winnipeg MB | 3.6 |
| Edmonton AB | 3.3 |
| Calgary AB | 3.1 |
| Trois-Rivieres QU | 2.7 |



### Note-able Quote

*"Your life is the sum result of all the choices you make, both consciously and unconsciously. If you can control the process of choosing, you can take control of all aspects of your life. You can find the freedom that comes from being in charge of yourself."* - Robert F. Bennett

# 'HARD TAKE DOWN' DID NOT TURN DETENTION INTO ARREST

**R. v. Cunanan,**
**2008 File NO.: 147/07 OntSCJ**

As a result of information provided by a credible and confidential informant police began an investigation into two stolen automobiles. Police also received information that the accused, a suspect, always had guns in his car and on his person. A decision was made to attend in the area of the accused's residence and, if he entered his vehicle, stop him and investigate. Officers understood that if the accused was arrested, he could be searched, but if he was stopped and investigated he could only be patted down.

The accused was observed exit his building and walk towards his car, enter it, start it, and roll down the windows. An instruction to "take down" his vehicle was given. Police did not want the accused to leave the parking lot because the area was densely populated, there were potentially many people on the streets, and to prevent any possibility of a pursuit. As well, if there were guns in the accused's vehicle and shots were fired, the apartment building would provide a back stop for bullets. The parking lot was the safest area to stop the accused.

An officer stopped her vehicle about 4 or 5 feet from the nose of the accused's vehicle as it was backing out of a parking spot and readying to proceed out of the lot. The officer drew her firearm, ran to the accused in the driver's seat and yelled, "Police, don't move, let me see your hands." The accused raised his hands then put them down and placed them on his lap. The officer told the accused to turn the vehicle off, but he did not move, so she took him from the vehicle and put him face down on the ground. The accused was patted down, but no weapons or drugs were found on him.

The accused's car began to roll and struck the police vehicle. An officer saw the vehicle rolling forward, went to the driver's side, opened the door, reached in, put it in park, and then turned the motor off. In doing so, he saw a plastic package on the floor of the vehicle directly in front of the driver's seat believed to contain cocaine. The package was seized and the accused was arrested for possessing cocaine, cautioned and given his rights to counsel. The vehicle was then searched after the arrest. Inside a driver's side compartment in the trunk two 20 gauge shotgun shells wrapped in a piece of T-shirt were found. A search warrant to the accused's apartment was subsequently obtained and a revolver, shotgun, ammunition, more than 750 grams of powdered cocaine, nine grams of crack cocaine, 22 grams of oxycodone, and 150 grams of methamphetamine were discovered. The accused was subsequently charged with 18 weapons and drug offences.

During the first phase of a *Charter* application in the Ontario Superior Court of Justice where the accused sought to have all the evidence excluded under s.24(2) of the *Charter*, Justice McWatt had to determine whether the accused was detained for investigative purposes or arrested. Officers testified they did not have reasonable grounds upon which to arrest the accused at the time the take down was ordered. Rather, the accused was to be stopped and investigated and if, after investigation, nothing was found which could give them grounds to arrest, the accused was to be released. The accused, however, argued he was under arrest from the beginning of the stop and that there were no grounds for that arrest, thus it was unlawful. In his view, when his vehicle was boxed-in and he was taken out of it at gun point, even before any cocaine was located, the officers were conducting an arrest because they believed he was in possession of a firearm and drugs. Since the arrest was unlawful (lacking reasonable grounds), he contended the search and seizure from his vehicle was unreasonable as was the search and seizure from his residence.

The Crown, on the other hand, submitted that the accused was not under arrest but had only been detained for investigative purposes, which the police were entitled to do. Drawing a firearm, extracting the accused from his car, and placing him on the ground were justifiable for officer and public safety and, in the Crown's opinion, did not turn the stop into an arrest. The officers did not arrest him until they saw, in plain view, the cocaine in his car.

"... [the officer's] forceful take down with the firearm in a low ready position was measured and reasonable. That feature of this stop did not turn the intended detention into a de facto arrest."

**Detention or Arrest?**

In this case Justice McWatt found the encounter between the accused and the police was not an arrest, but was an investigative detention. But for the drawing of a firearm and putting the accused on the ground, she found every aspect of the stop matched the hallmarks of an investigative detention.

- The detention for investigative purposes was justified. There was a clear nexus between the accused and recent and ongoing offences of car theft and the possession and sale of drugs, and the possession of firearms based on the information from the police informant;
- The take down was brief (about four minutes) and the situation unfolded quickly from the initial stop to seeing the cocaine in the vehicle. Police entry into the accused's car was an instinctive and necessary response to its rolling forward and hitting the police vehicle;
- There was no plan prior to the stop and finding the cocaine to transport the accused back to the police station;
- Police wanted to stop and investigate the accused and had no grounds to arrest him. If nothing came of the investigation, he was to be released;
- No words were used during the takedown which could be interpreted as part of an arrest until after the cocaine was seized.

As for the hard take down, it was reasonable. "In light of [the accused's] suspected prior activities – especially as related to owning and using a firearm as set out in the occurrence report and 208 contact sheets, and based on the confidential informants' information that [the accused] had a gun in his car the day before he was stopped and he was ready to use it, the manner in which he was stopped, although dramatic, and significantly interfering with his liberty, was necessary in the circumstances," said Justice McWatt. She noted that police officers make split-second decisions every day, can find themselves in dangerous and potentially volatile situations, and have little time to reflect. Therefore they should be given a good deal of leeway and second guessing should be avoided:

> When [the officer] told [the accused] to put his hands up, he did so and then put them into his lap. When [the officer] told [the accused] to turn off his vehicle, he did not. Believing what she did about [the accused's] proclivity to possess and use a gun, and their [sic] being no evidence to contradict her apprehension, her forceful take down with the firearm in a low ready position was measured and reasonable. That feature of this stop did not turn the intended detention into a de facto arrest. [para. 48]

The stop was a detention for investigative purposes and not an arrest.

Complete case available at www.canlii.org

## 'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (b) **False**—see *R. v. Bradley* (at p. 30 of this publication).
2. (a) **True**—see *R. v. Weintz* (at p. 8 of this publication).
3. (a) **British Columbia**—see *Supreme Court Hearings Down* (at p. 4 of this publication).
4. (a) **True**—see *R. v. Willier* (at p. 10 of this publication).
5. (a) **True**—see *R. v. Meganhy* (at p. 6 of this publication).
6. (a) **impaired driving**—see *R. v. Weintz* (at p. 8 of this publication).

# LEGALLY SPEAKING:

## Second Guessing Police Discretion

"It is my view that Courts ought to exercise considerable caution when they, on the basis of hindsight, examine the exercise of discretions of police officers as to procedures to be implemented for investigations or methods of conducting incidental searches. We ask police to exercise these discretions in difficult, often dangerous and urgent circumstances. Courts must give the police sufficient latitude and grounds to conduct these investigations in safety for their own protection. Courts should be hesitant about second guessing the exercise of these discretions unless they are exercised clearly in an unreasonable manner." - Alberta Provincial Court Judge Sully, *R. v. Graham*, 1999 ABPC 138 at para. 19.

# PASSENGER IN VEHICLE NOT NECESSARILY DETAINED DURING TRAFFIC STOP

**R. v. Bradley, 2008 NSCA 57**

A police officer spotted a vehicle with its rear end very low, followed it, and ran the plate, learning the registered owner of the vehicle had a suspended license. The officer decided to stop the vehicle for two reasons: (1) the low rear end suggested a possible mechanical problem and (2) to check and see if the suspended owner was driving. He pulled the vehicle over and there were four occupants. Another officer attended as back up and stood on the passenger side of the vehicle to keep an eye on the occupants while the other officer dealt with the driver.

The officer received license, insurance and registration from the driver, who was not the registered owner. The owner, however, was in the front passenger seat. Both were cooperative with police. The officer explained the reason for the stop, determined the vehicle had a valid safety inspection, and took no further steps to examine the mechanical state of the vehicle. The accused, seated in the rear seat, asked the officer why they were being stopped and what the problem was. The officer felt that the accused's tone indicated some belligerence and hostility and noted he had somewhat glassy eyes and his speech appeared to be somewhat slurred, consistent with consumption of alcohol. The officer could also smell alcohol coming from the car, but the driver was sober.

The officer asked the accused his name, as well as the fourth person in the vehicle. The accused said he had done nothing and asked why he should have to give his name. The officer replied by stating if he hadn't done anything wrong, why wouldn't he give his name? The accused then reluctantly provided his name. He was run on CPIC and it was determined he was breaching a recognizance that prohibited him from possessing, consuming, or using alcohol. He was arrested, read his rights, and charged accordingly.

At trial in Nova Scotia Provincial Court, the trial judge found the driver was initially the only target of the stop, which was to investigate possible motor vehicle infractions. The officer had little interest, if any, in the passengers and the reason for the traffic stop had nothing to do with them. Nor did he have any reason to suspect that any offence had been committed by any of the vehicle's occupants. The judge concluded the police were not taking advantage of a traffic stop to question its occupants in relation to other criminal activity. Rather, contact between the accused and the officer was initiated by the accused. The accused was never told he was compelled to provide his name or that he could not leave the car or otherwise had his movements controlled. The accused was convicted of breaching a recognizance.

The accused's appeal to the Nova Scotia Supreme Court was unsuccessful. The appeal judge ruled that the stop was made for the purpose of investigating traffic offences and the officer did not concern himself with the accused until the accused initiated the conversation, in a hostile tone of voice. That led to the police officer asking for a name, primarily to run on CPIC for a status check as well as for assessing officer safety (which was accepted as a reasonable basis for asking the accused his name in the circumstances). As well, the accused indicated some awareness that he did not need to give his name by the way he responded to the officer's request. The appeal judge found the accused was not in detention just because he was a passenger in a vehicle lawfully stopped by police. This was not a case where the traffic stop was made to investigate criminal activity. Rather, the stop was initially made to investigate two possible motor vehicle infractions. The appeal judge stated:

> I do not accept the blanket proposition that once the driver of a motor vehicle is detained under a lawful traffic stop, all of its passengers are likewise detained automatically within the meaning of the Charter. In the case of the driver, the detention is made in the context of the police officer carrying out his statutory duties and powers under the Motor Vehicle Act. It is the driver who is being investigated. The presence of a passenger, on the other hand, is simply incidental or happenstance in situations where a traffic stop is made solely for purposes of investigating possible Motor Vehicle Act infractions.

Since there was no detention the accused's s.9 or 10 rights were not engaged.

The accused then appealed to the Nova Scotia Court of Appeal again arguing his s.9 and 10 rights had been violated. He submitted that he was detained when asked for his name, the detention was arbitrary (contrary to s.9), and that the police failed to advise him of his right to counsel (contrary to s.10(b)). In his view, the evidence of his name and the information received by the police officer on CPIC should be excluded under s.24(2).

"[I]t is not an absolute rule that every passenger in a motor vehicle is automatically detained as soon as the vehicle is pulled over by police."

Justice Roscoe, authoring the unanimous judgment, concluded the trial judge had not erred in his analysis in holding there was no detention. He agreed that "it is not an absolute rule that every passenger in a motor vehicle is automatically detained as soon as the vehicle is pulled over by police." Here, the accused was not under any physical or psychological restraint as a form of detention and no direction or demand was given to him by the police officer.

Although the reasons the police have for stopping a vehicle are generally more relevant to the issue of whether a detention was arbitrary than to the question of whether there was a detention, Justice Roscoe was not persuaded, as submitted by the accused, "that it is necessarily an error of law in the case of the passenger, to consider the reasons for and the manner in which the stop is handled, as part of the overall circumstances that must be weighed when deciding whether there is a psychological or physical restraint." Determining whether a detention occurs involves a fact-specific and context-sensitive inquiry and the reasons for stopping a citizen for questioning is one of the relevant factors. Justice Roscoe concluded:

> In this case the trial judge heard the testimony of the police officer and the [accused] and concluded that on the facts of this case there had been no direction or demand given by the police officer and that the [accused] was not under any significant physical or psychological restraint and therefore not detained when he was asked to state his name. The summary conviction appeal court judge was not persuaded that the trial judge committed palpable or overriding error in reaching that conclusion. My review of the record satisfies me that [the appeal judge's] decision discloses no error of law.
>
> Since there was no detention it is unnecessary to address the question of whether there was an arbitrary detention, or a violation of the [accused's] rights pursuant to ss. 9 and 10 of the Charter. Therefore there is no need to discuss the s. 24(2) issue. [paras. 20-21]

The accused's appeal was dismissed.

Complete case available at www.canlii.org

## DID YOU KNOW...

...that...

- the average elapsed time from an accused's first court appearance to their last was 237 days (just under eight months) in 2006/ 2007. This is up almost a month longer than 2005/2006, which was 211 days. Quebec had the longest average elapsed time at 294 days while Prince Edward Island had the shortest at 62 days.
- probation was the most frequently imposed sanction (43% of guilty cases), followed by imprisonment (34%), and a fine (30%).
- in cases where probation was imposed, 51% were for a term between >6-12 months, 31% >12-24 months, 10% >3-6 months, 5% >24 months, and 4% 3 months or less.
- the average length of a prison sentence imposed was 124 days. Prince Edward Island had the highest rate of incarceration where 55% of guilty persons were incarcerated, followed by the Yukon (42%), Northwest Territories (40%), British Columbia (39%), Alberta (38%), Newfoundland (35%), Manitoba (35%), Quebec (34%), Nunavut (34%), Ontario (33%), Saskatchewan (26%), New Brunswick (25%), and Nova Scotia (25%).
- in cases where incarceration was imposed, 56% were for 1 month or less, 20% >1-3 months, 10% >3-6 months, 6% >6-12 months, 5% 2 years or more, and 3% >1 year - <2 years.
- the average fine amount imposed was $759.

Source: Statistics Canada, 2008, Adult Criminal Court Statistics, 2006/2007, Catalogue no. 85-002-X available at www.statcan.ca

### Note-able Quote

*"I sometimes wish that people would put a little more emphasis upon the observance of the law than they do upon its enforcement."* - Calvin Coolidge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