# IN SERVICE: 10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers in Canada.


## BY THE BOOK– New Law


### SLOW DOWN FOR OFFICER SAFETY

A new Division 47 in British Columbia's *Motor Vehicle Act Regulations* has been created. This provision requires drivers approaching stopped official vehicles with flashing lights to slow down and, if safe to do so, move over into the adjacent lane in order to pass by.


On roads posted at 80 km/h and above, drivers must slow to 70 km/h and on roads posted below 80 km/h must slow to 40 km/h.

Official vehicles include police, fire, ambulance and tow vehicles, as well as vehicles used by commercial vehicle safety and enforcement personnel, passenger vehicle inspectors, conservation officers, park rangers, and special provincial constables employed in the Ministry of Forests and Range.

The new law came into force on June 1, 2009 and drivers who fail to obey may be ticketed $173 and assessed three (3) penalty points on conviction.

See page 3 for complete wording.

### Did you know...

... that s.4.28(8) of British Columbia's *Motor Vehicle Act Regulations* only allows certain officers to "drive an official vehicle equipped with blue flashing lights and illuminate them in the discharge of the officer's duties". These officers include:

- ☑ members of municipal police forces;
- ☑ members of the RCMP;
- ☑ members of the military police;
- ☑ conservation officers;
- ☑ park rangers.

## Highlights In This Issue




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# POLICE LEADERSHIP APRIL 10-13, 2011

Mark your calendars. The British Columbia Association of Chiefs of Police, the Ministry of Public Safety and Solicitor General, and the Justice Institute of British Columbia Police Academy are hosting the Police Leadership 2011 Conference in Vancouver, British Columbia. This is Canada's largest police leadership conference and will provide an opportunity for delegates to discuss leadership topics presented by world renowned speakers.

www.policeleadershipconference.com

July 31 to August 9, 2009

www.2009wpfg.ca

## DIVISION 47 - SPEED LIMITS AND TRAFFIC RULES IF OFFICIAL VEHICLE PARKED ON A HIGHWAY

### Definition

47.01 In this Division, "official vehicle" means

(a) a motor vehicle operated by a peace officer, constable or member of the police branch of Her Majesty's Armed Forces in the discharge of his or her duty,

(b) an ambulance as defined in the Emergency and Health Services Act,

(c) a motor vehicle operated by fire services personnel as defined in the Fire Services Act in the discharge of personnel duties,

(d) a tow car, and

(e) a motor vehicle operated by one of the following in the discharge of his or her duty:

(i) a member of the Conservation Officer Service as described in section 106 of the *Environmental Management Act*;

(ii) a person authorized to exercise the powers and perform the duties of a constable or peace officer for purposes set out in the *Inspectors' Authorization Regulation*, B.C. Reg. 372/92;

(iii) a person authorized to exercise the powers conferred on, and perform the duties of, peace officers for the purposes of enforcing the *Passenger Transportation Act and the Passenger Transportation Regulation*;

(iv) a park ranger appointed under section 4 (2) of the *Park Act*;

(v) a person employed in the Ministry of Forests and Range who is appointed as a special provincial constable under section 9 of the *Police Act*.

### When an Official Vehicle is Stopped

47.02 (1) Subject to subsection (2), if an official vehicle with illuminated flashing red or blue lamps or lights, or both, or flashing amber lamps or lights is stopped on or on the side of a highway, a person driving a motor vehicle on the highway in either direction must drive the motor vehicle at the following rate of speed when approaching or passing the official vehicle:

(a) 70 km/h if signs on the highway limit the rate of speed to 80 km/h or more;

(b) 40 km/h if signs on the highway limit the rate of speed to less than 80 km/h.

(2) Subsection (1) does not apply to a driver who approaches or passes an official vehicle from the opposite direction on a highway that contains a laned roadway or is divided by a median.

(3) In addition to the requirements of subsection (1), a driver travelling in a lane adjacent to the stopped official vehicle or in the same lane in which the official vehicle is stopped must, if it is safe to do so, and unless otherwise directed by a peace officer, move his or her motor vehicle into another lane of the laned roadway, if any.

See pages 14-15 for other provincial laws concerning slowing down for stopped emergency vehicles.

## SUPPORT THE BADGE: RELATIONAL SURVIVAL FOR POLICE FAMILIES


**www.supportthebadge.ca**

# TRAFFIC ACT & COMMON LAW DETENTION POWERS NOT MUTUALLY EXCLUSIVE

## R. v. Dhuna, 2009 ABCA 103

A police officer assigned to an auto theft unit was driving an unmarked police vehicle at about 1:30 a.m. in a residential area. He was on the look-out for a black SUV that had been stolen and was reported to be in the area. His attention was drawn to another vehicle driven by the accused. As a marked police vehicle drove by, the brake lights of the vehicle came on and it made a quick left turn onto a side street. The vehicle then made a second similar evasive manoeuver when another marked police vehicle drove by. As a result of these suspicious driving manoeuvers, the officer ran the licence plate and found that the vehicle had not been reported stolen. However, it appeared that the driver was attempting to avoid police contact and the officer suspected the vehicle may have been recently stolen, but not yet reported – a fairly regular occurrence.

> "In our view, the officer in the present case was acting under dual authority when he detained the [accused] – under the TSA to check for registration and ownership of the vehicle, and under his duty to enforce the Criminal Code provisions against theft of a motor vehicle."

The officer called for back-up to make a traffic stop, but before he could stop the vehicle, it pulled over to the curb and the accused exited the vehicle and approached the front door of a residence. The officer got out of his vehicle, identified himself, and directed the accused to stop and to move towards him. The accused was seen throw something away in the snow - a clear plastic item which later turned out to be a bag of crack cocaine. The bag was eventually found and the accused was arrested. The officers searched the vehicle incidental to the arrest and found more drugs and weapons.

In Alberta Provincial Court the trial judge found the accused was detained to determine if he was the registered owner of the vehicle the officer had seen making suspicious driving manoeuvers and to allay his concern that the vehicle may have been recently stolen and not yet reported. The trial judge noted that the police have a wide constitutional power to randomly stop motorists to check for a driver's licence, registration, insurance, mechanical fitness of a vehicle, and the sobriety of the driver. These stops are generally prescribed by provincial statute and justified under s.1 of the *Charter*. In Alberta, such stops are authorized by ss.166 and 167 of the *Traffic Safety Act* (*TSA*) and the trial judge found the officer, a member of the auto theft unit, had the lawful authority to detain the accused, pursuant to these sections to determine if he was the registered owner of the vehicle. The accused's detention was not arbitrary and the officer was in the lawful execution of his duty. Accordingly, there was no s.9 *Charter* violation and the accused was convicted of possessing drugs for the purpose of trafficking and weapons possession.

The accused appealed to the Alberta Court of Appeal arguing the trial judge erred in finding the detention lawful and not a breach of his s. 9 *Charter* right not to be arbitrarily detained. Although the trial judge found that the purpose of the stop was to check the vehicle registration, which was authorized under the *TSA*, the accused submitted that because there was also another distinct purpose outside the *TSA* - the stolen vehicle investigation - the *TSA* power was unavailable. He also suggested that the officer could only rely on his common law power of detention—that of reasonable cause—but did not.

The unanimous Alberta Court of Appeal rejected the accused's arguments. Provincial traffic act powers and the common law power to detain are not mutually exclusive. The Court stated:

> Police officers are empowered to stop vehicles at random (i.e. arbitrarily), even outside organized stop check programs, so long as they do so for "legal reasons" related to driving a car, such as checking a driver's licence and insurance, sobriety and mechanical fitness of the car. Provided the officer is acting lawfully within the scope of the statute, such random stops are

> justifiable under the Charter. Random stops are justifiable under the Charter because of the importance of highway safety; the public danger of impaired driving and motor vehicle accidents; and the relative importance of enforcing motor vehicle offences which cannot generally be detected by observation of the driving (such as possession of a valid licence and insurance, mechanical fitness of the vehicle and the sobriety of the driver). It is accepted that the offence of impaired driving involves driving activity and also engages the purpose of the TSA to achieve safety on the highways.
>
> The mandate of the TSA includes administration and enforcement of registration. The purpose of stopping someone to check registration includes checking that the vehicle is properly in the possession of the driver. This falls within the broader purpose of traffic safety, as well as within the realm of "legal reasons"… [references omitted, paras. 16-17]

"Police officers are empowered to stop vehicles at random (i.e. arbitrarily), even outside organized stop check programs, so long as they do so for 'legal reasons' related to driving a car, such as checking a driver's licence and insurance, sobriety and mechanical fitness of the car. Provided the officer is acting lawfully within the scope of the statute, such random stops are justifiable under the Charter."

And further:

> We see no reason to draw a bright line here between traffic safety concerns and an investigation of a possible stolen vehicle. More importantly, there is no sound reason to do so from a policy perspective. Why should police be allowed to arbitrarily stop someone under the TSA but not to selectively stop a driver in the face of reasonable concern that the driver should not be driving the vehicle for any number of possible highway safety reasons - e.g. the vehicle is being operated poorly or erratically, the driver appears to be impaired, the driver is unlicenced to drive, or is not in lawful possession of the vehicle? [para. 19]

Here, the officer's purpose in detaining the accused was to check his registration. The fact that the officer also had a related legitimate purpose did not invalidate the detention. "In our view, the officer in the present case was acting under dual authority when he detained the [accused] – under the TSA to check for registration and ownership of the vehicle, and under his duty to enforce the *Criminal Code* provisions against theft of a motor vehicle," said the Court. The trial judge made no error in concluding that the accused was being stopped under ss.166 and 167 of the *TSA* to check vehicle registration on the basis of suspicious and evasive driving activity observed by the police. The detention was lawful and not arbitrary.

Additionally, the officer had reasonable grounds to detain the accused under the common law power of investigative detention. "Here the officer had a reasonable and specific concern that the vehicle may have been recently stolen," sated the Court. "That, coupled with the evasive driving which seemed aimed at avoiding the police and the officer's general mandate as a member of the [auto theft unit] to search for stolen vehicles, provided sufficient reasonable grounds for the detention." The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

# ACADEMIC EXCERPT:

"[O]nce the detainee has had the opportunity to consult with counsel...the police are free to question a detained person, even in the face of protestations that he or she does not want to participate in the interview. This means that, while section 10(b) provides protection against self-incrimination through access to counsel, it does not create a right not to be interviewed or interrogated by state officials." - Hon. Justice Gary T. Trotter, "The Limits of Police Interrogation: The Limits of the Charter" in Jamie Cameron & James Stribopoulos, eds., The Charter and Criminal Justice: Twenty Five Years Later (Markham: LexisNexis Canada Inc., 2008) 293.

# VEHICLE STOP NOT ARBITRARY DESPITE CONCURRENT MOTIVATIONS

## R. v. Kaddoura, 2009 BCCA 113

A police officer arranged, as part of an undercover operation, to meet with an individual for the purpose of purchasing cocaine in the parking lot of a park. The transaction took place with the front passenger of the vehicle. The accused was allegedly the driver. Following the purchase, the officer watched the car leave and a vehicle description and licence plate number was subsequently transmitted to other police officers in the area and a request was made to pull the vehicle over for the purpose of identifying the occupants. An officer on general patrol spotted the vehicle and assumed it was to be stopped in relation to a drug investigation—he was not given any other information justifying a stop of the car. However, the officer noticed that the left taillight was damaged—the lens was cracked and white light was visible when the vehicle braked—a violation of s. 4.17(3)(a) of British Columbia's *Motor Vehicle Act Regulations*. The vehicle was pulled over because of the brake light problem.

After stopping the car, the officer asked the driver to come to the rear of the vehicle, where he pointed out the damaged brake light and warned the driver that it was unlawful to drive the vehicle in that condition. He then asked the driver for the vehicle registration and driver's licence—the officer's invariable practice when he pulled over a motor vehicle. The driver's name and birth date were recorded. He was not the owner of the vehicle and the other two vehicle occupants were requested to provide identification. After identifying the occupants of the vehicle, the officer allowed the vehicle to depart; no arrests were made and no violation notices were issued. But the accused was later charged.

> "The fact that the officer had other reasons to want to identify the driver does not transform a lawful stop into an unlawful one."

At trial in British Columbia, the officer testified he would not have pulled the vehicle over if he had not noticed the defect in the brake light. He said he didn't feel comfortable with the request to stop the vehicle and had he not seen the defect he would have asked for more information about the reason for the stop. The trial judge found the officer's motivation for stopping the car was to identify the occupants, even though the officer felt he could stop it for the broken tail light. Since the officer's aim or purpose in stopping the vehicle was to identify its occupants, the stop was an arbitrary detention and resulted in a s.9 *Charter* violation. And in obtaining the driver's licence of the accused, the officer obtained "conscriptive" evidence, the admission of which would render the trial unfair. The evidence identifying the accused as the driver of the vehicle (and as a person possibly involved in the earlier drug transaction) was obtained as a result of the vehicle stop and was

s.4.17(3)(a) of British Columbia's Motor Vehicle Act Regulations

"A stop lamp must be ... capable of displaying only red light visible from a distance of 100 m to the rear of the vehicle in normal sunlight."

excluded pursuant to s. 24(2) of the *Charter*. The accused was acquitted of unlawfully trafficking in cocaine.

The Crown appealed to the British Columbia Court of Appeal arguing the trial judge erred in holding the vehicle stop breached s.9 of the *Charter*. The accused, on the other hand, contended that the "dual purpose" stop was tainted and thus constituted an arbitrary detention. In other words, he suggested that the legitimate purpose (traffic safety) was tainted by the ulterior purpose (a criminal drug investigation).

"The accused's constitutional right is a right not to be arbitrarily detained. A roadside stop of a vehicle with a defective taillight is not an arbitrary detention. The accused did not have a Charter right not to be identified by the police – in requesting his driver's licence and recording the details of it, the police acted under statutory authority and committed no unlawful act."

Justice Groberman, authoring the unanimous decision, agreed with the Crown. He found the officer had proper grounds for stopping the vehicle because he had observed a *Motor Vehicle Act* violation. "He was fully entitled to stop the vehicle under that statute, and to request that the driver produce his licence and vehicle registration documents," said Justice Groberman. "The fact that the officer had other reasons to want to identify the driver does not transform a lawful stop into an unlawful one." He continued:

> The accused's constitutional right is a right not to be arbitrarily detained. A roadside stop of a vehicle with a defective taillight is not an arbitrary detention. The accused did not have a Charter right not to be identified by the police – in requesting his driver's licence and recording the details of it, the police acted under statutory authority and committed no unlawful act. [para. 13]

In this case there was no improper search nor inappropriate questioning which followed the stop, as has been a concern in other cases where evidence obtained in motor vehicle stops has been ruled inadmissible. Nor was it a case where police were relying on a check-stop program authorizing arbitrary detentions, where there is a *prima facie* infringement of s.9 but justifiable under s. 1. In those cases, the s. 1 analysis is altered when a random check-stop is used to conduct criminal investigations as well as motor vehicle checks. The stop becomes more invasive and the pressing and substantial objective of promoting traffic safety can be diluted.

But here, the stop was not arbitrary because a violation of the *Motor Vehicle Act* had been observed. It did not constitute a prima facie infringement of s.9 and therefore there was no need to consider the effect of other police motivations for the stop on a s.1 analysis. Whatever other concurrent motivations the officer may have had for the motor vehicle stop, one such purpose was to deal with a *Motor Vehicle Act* violation. A lawful and reasonable basis to stop a motor vehicle is not transformed it into an arbitrary detention when a police officer has additional reasons to effect it:

> In summary, [the officer's] decision to stop the accused's vehicle was not an arbitrary one; he had witnessed a violation of the Motor Vehicle Act, and was entitled to stop the vehicle, and obtain the driver's identification. The fact that he also wished to know who was driving for the purposes of a drug investigation did not transform the lawful detention into an arbitrary one. There is no suggestion that [the officer] performed an unlawful search or otherwise violated [the accused's] Charter rights after stopping him. [para. 24]

The trial judge erred in finding that evidence identifying the accused as the driver of the vehicle was obtained in violation of his rights under the *Charter*, the Crown's appeal was allowed, and a new trial was ordered.

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

# INVESTIGATIVE DETENTION NOT OBJECTIVELY JUSTIFIED: CASH & COCAINE EXCLUDED

## R. v. N.O., 2009 ABCA 75

Shortly after midnight a police officer patrolling in an unmarked police car saw the accused exit his car and enter an apartment building that had two glass doors. Another male, who had been sitting on the stairs inside the second door, reached his hand through that door to the accused's hand. A brief hand-to-hand exchange occurred. The male disappeared into the building and the accused returned to his car. As the accused was closing his car door, the officer approached and ordered him to exit. The officer told the accused that he was being detained for a drug investigation, handcuffed him and conducted a surface pat-down search. The search revealed a hard object in his front pants pocket. A subsequent search of the pocket found car keys (the hard object), $800 cash, and a sandwich bag containing 14 individually wrapped pieces of crack cocaine. A cellular telephone on the driver's seat rang and the officer answered it. The caller wished to buy drugs. The accused was arrested for possessing drugs for the purpose of trafficking and possessing proceeds of crime, and advised of his *Charter* rights.

At trial in Alberta Provincial Court the accused argued his rights under ss.8 (search or seizure) and 9 (arbitrary detention) were breached and the $800 cash and crack cocaine were inadmissible under s. 24(2). The officer testified he was familiar with the area and had received complaints from residents about drug transactions occurring in the neighbourhood. He described his experience as a drug undercover officer and his familiarity with similar hand-to-hand drug exchanges. He testified that, with his knowledge of the neighbourhood, the time of night, and the reports of drug transactions in lobbies of surrounding buildings, he concluded that he had observed was very similar to his experience with drug transactions. He said he handcuffed the accused because of safety concerns arising from the time of night, the fact that he was working alone, his knowledge that drug trafficking could be violent and involve weapons, and the absence of anyone else in the area.

The trial judge ruled there had been no *Charter* infringement. The officer had extensive experience in drug-related investigations (undercover and otherwise) and residents had complained of similar modes of drug trafficking in the neighbourhood. The judge concluded that the events observed gave the officer cause to detain the accused for investigative purposes. Furthermore, the officer's handcuffing of the accused was justified and it was prudent for the officer to conduct a pat-down search because even a handcuffed person in possession of a weapon could pose a danger. The cash, the cellular telephone, and the crack cocaine were admitted and the accused was convicted of possessing cocaine.

The accused appealed to the Alberta Court of Appeal arguing the trial judge misapprehended and misapplied the law respecting arbitrary detentions and searches incidental to investigative detentions. The Crown conceded that the accused was detained, but denied that it was arbitrary or that the search was improper.

> "Police officers 'must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing.' Police conduct must be reasonably necessary or justified in the specific circumstances, in the context of the nature of the liberty interfered with and the importance of the public purpose served."

The unanimous court noted the delicate balance to be struck in adequately protecting an individuals liberty (the right to walk the streets free from state interference) while recognizing legitimate police functions (the necessary role of the police in criminal investigation). "Police officers 'must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing,'" said the Court. "Police conduct must

be reasonably necessary or justified in the specific circumstances, in the context of the nature of the liberty interfered with and the importance of the public purpose served."

Reasonable grounds to detain has both objective and subjective aspects. In citing the Supreme Court of Canada's judgment in *Mann*, the Alberta Court of Appeal noted "the detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference." In *Mann*, the Court also observed that "[t]he presence of an individual in a so-called high crime area is relevant only so far as it reflects his or her proximity to a particular crime. The high crime nature of a neighbourhood is not by itself a basis for detaining individuals."

" The presence of an individual in a so-called high crime area is relevant only so far as it reflects his or her proximity to a particular crime. The high crime nature of a neighbourhood is not by itself a basis for detaining individuals."

In this case, the Alberta Court of Appeal found the trial judge erred in applying the test for arbitrary detention. "While the officer undoubtedly believed he had grounds to detain the [accused], in our view the circumstances do not satisfy the objective requirement of reasonable cause for investigative detention," said the Court. The Court continued:

> The trial judge noted that the events transpired "in the middle of the night". It was shortly after midnight. Since not all law-abiding citizens are home before midnight, it is difficult to see how the time of night could form part of the necessary constellation of circumstances objectively justifying detention.
>
> The officer did not know the individual he detained or the building he entered. He was aware that apartment blocks "in this area" were plagued with drug transactions in their lobbies, citing citizen complaints as well as his own experience in cases that had led to drug arrests in lobbies "in this area". He relied on the fact that there was a hand-to-hand exchange between the cross-appellant and someone waiting inside the building, with no conversation between them. He did not see what was exchanged. He had experienced other hand-to-hand exchanges that turned out to be drug transactions.
>
> The officer's evidence about the location and type of building where such events occurred was too vague to contribute to reasonable grounds to detain. He did not specify the size of the "area" or the types or numbers of apartment blocks in it. With such specificity, there may be other facts when a detention could be justified. But on these facts, such a general approach gives rise to a grave risk of police interference with lawful activities. As Iacobucci J. stated in Mann, the high crime nature of a neighbourhood, alone, is not enough. Even though some apartment buildings in a neighbourhood may be known to the police as havens of drug activity, that does not mean that anyone who enters any apartment building in an ill-defined area or neighbourhood can objectively be suspected of criminal activity.
>
> The Crown points to the hand-to-hand exchange which, in the officer's experience, was typical of drug transactions. But in many innocent circumstances one person may hand a small object (such as a key or an earring) to another. Without information about the individuals or the building, the fact of a hand-to-hand exchange shortly after midnight does not elevate the circumstances to the objectively reasonable level necessary to justify detention.

> The trial judge appears to have placed some weight on the fact that there was no conversation as the exchange took place. But a quick innocent exchange of, say, a key, might have been preceded by an earlier telephone conversation; a jilted boyfriend might hand over an apartment key or a ring to his former partner without conversation.
>
> The trial judge also emphasized that the exchange did not take place in a park or other public place. She did not explain why an exchange in an apartment lobby is more suspicious than one in a park or other public place.
>
> Added to the dearth of objective factors is the fact that, according to the officer, the [accused] was co-operative when asked to step out of his car. Since there was virtually no conversation between the two leading up to the detention, the [accused's] demeanour could hardly have aroused an objective suspicion that he was engaged in crime. [paras. 38-44]

The accused's s.9 rights were breached and, since the investigative detention was unlawful, the search and subsequent arrest that followed were also unlawful. But had the Court found the detention lawful, it we would not have interfered with the trial judge's conclusions about the handcuffing, pat-down search that revealed a hard object, and the examination of the hard object. The officer's safety concerns had been accepted by the trial judge, which would have provided the necessary justification for the pat down and examination of the hard object.

As for the exclusion of evidence under s.24(2) of the *Charter*, the evidence was inadmissible. The evidence was real evidence (such as the cocaine and cash) and would not affect trial fairness—it existed independently of the violation. And there was nothing to suggest a lack of good faith on the officer's part—the breaches stemmed from his subjective view that he was entitled to detain and his safety concerns for the handcuffing and search were accepted. However, "the rapidity with which the events unfolded demonstrate that he neglected to take advantage of other available investigative techniques," said the Court. "He initiated no preliminary conversation with the [accused] to inquire about what he was doing. Instead, he immediately yelled at him to get out of the car. He did not run a check on the vehicle licence plate to see if its owner had a criminal record. He did not call for back-up. Both the resulting hand-cuffing and the search of the [accused's] pants pocket (in which there was a strong privacy interest) were serious breaches of his *Charter* right under section 8." In excluding the evidence the Court further observed:

> The public has a strong interest in the detection of drug traffickers. On the other hand, it also has a deep interest in the right of citizens to come and go as they please, free from police interference. Without the unlawful detention and search, the evidence implicating the [accused] would not have been discovered. On all the facts of this case, it is our view that admission of the evidence would bring the administration of justice into disrepute. Therefore, the evidence should be excluded. [para. 50]

The accused's appeal was allowed, the cash and cocaine was excluded, and an acquittal was entered.

Complete case available at www.albertacourts.ab.ca

## s.10(b) INVOLVES BOTH INFORMATIONAL & IMPLEMENTATIONAL DUTIES

### R. v. Eashappie, 2009 SKCA 5

A police officer responded to a call of a truck in a ditch with the driver's door wide open, the vehicle running, and the accused sitting in the driver's seat. There were also two other males sitting and wine spilled in the truck. The accused's speech was slurred and his eyes were glassy. He was arrested for care and control of a motor vehicle while impaired by alcohol and placed in the back of the police car. He was very upset, rude and obnoxious. The officer advised the accused of his right to retain and instruct counsel without delay and he indicated he did not want

to talk to a lawyer. The breath demand was read from a card and the accused continued to be rude and threatening in his remarks.

After waiting for a tow truck the officer transported the accused to the police detachment where his samples could be taken by the breathalyzer technician. The arresting officer again told the accused about his right to counsel and again made the demand for a breath sample. The accused indicated he wanted to speak to a lawyer. He was placed in the phone room and the breathalyzer technician placed a call to Legal Aid duty counsel and then transferred the call into the phone room. Because the accused was very drunk the officer had to pick up the phone, advise the lawyer why the accused was there, and gave the phone to him. After a few minutes the officer saw that the receiver had fallen and went into the phone room. The accused was asked if he was finished speaking to the lawyer, but he only banged around and spoke in his own language. When the officer picked up the phone there was nobody there so she hung up. The accused subsequently refused to provide a sample and was charged accordingly.

At trial in Saskatchewan Provincial Court the accused testified he could not remember, among other things, being read the demand nor speaking with a lawyer on the telephone. The trial judge concluded that the breath demand was lawful (based on reasonable and probable grounds) and was made at the scene of the incident as well as repeated later at the detachment. His right to counsel was given immediately at the scene and the accused could not be saved by his own intoxication in failing to remember all or portions of the arrest, breath demand, rights given and contact with a lawyer. The trial judge found the police assisted the accused in exercising his right to counsel and gave him the opportunity to do so. He was convicted of refusal.

The accused appealed his conviction to the Saskatchewan Court of Appeal contending the trial judge erred by failing to find there was a violation of his s.10(b) *Charter* right to counsel. Justice Hunter, delivering the unanimous judgment, disagreed. In deciding whether the accused was given the necessary information about his right to counsel and a reasonable opportunity to exercise that right, Justice Hunter first described the obligations on the police:

> [T]here is imposed on the authorities both an informational and an implementation duty when a person is arrested or detained. [T]he informational duty requires that the detainee be advised of his right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel. ... The implementation duty has two aspects. First, when the detainee indicates he wishes to exercise his right to counsel, then he must be provided with a reasonable opportunity to exercise the right. Secondly, the state authorities are to refrain from eliciting evidence from the detainee until he has had such a reasonable opportunity (commonly referred to as the Prosper warning). [reference , para. 10]

In this case the officer informed the accused about his right to counsel twice - first at the scene and again at the detachment. And when the accused indicated he wanted to exercise his right to counsel, the police assisted by telephoning Legal Aid, spoke to duty counsel, made sure counsel was on the line when the call was transferred into the room, and stated the reason for the arrest before handing the telephone to the accused. Some three to five minutes later, when the accused did not appear to be talking on the telephone, the officer asked him whether he was finished with the call. When there was no affirmative response from the accused, the officer checked to see whether counsel was still on the line. When there was no one at the other end of the connection, she hung up the telephone. The accused had failed to establish any breach of his s. 10(b) *Charter* right and the appeal was dismissed.

Complete case available at www.canlii.org.

# RUNNING SUSPECT AT RIGHT PLACE, RIGHT TIME: DETENTION JUSTIFIED

## Ward v. British Columbia, 2009 BCCA 23

Police heightened security in an area where Canadian Prime Minister Chretien was to participate in a ceremony to mark the opening of a gate at the entrance to the Chinatown area of Vancouver. At some point they received information that someone intended to throw a pie at the prime minister, an event that had occurred elsewhere a year earlier. This report was taken seriously. A description was given over the police radio (white male, 30 to 35 years, 5' 9", dark, shorter hair, wearing a white golf shirt or t-shirt with some red on it and jeans or shorts. Shortly thereafter, another radio broadcast reported that a male matching the description was running southbound down a street. The plaintiff, a lawyer, was a white male, mid 40s, grey or silver, collar length hair, wearing jeans and a predominately grey t-shirt with some red on it. An officer saw the plaintiff running down the same street and yelled for him to stop. The plaintiff was detained by police for attempted assault on the Prime Minister, back-up was called, and he was handcuffed. The plaintiff began to yell and create a disturbance and he was subsequently arrested for breach of the peace, transported to jail, strip searched, and held for more than four hours before being released. The plaintiff then sued police and others for wrongful imprisonment and other torts.

> "Dissimilarities between a suspect's physical description and the physical appearance of the person being detained are not necessarily enough to allay reasonable suspicion. The investigating officer could not safely conclude that the broadcast description was completely accurate. The dissimilarities between description and appearance no doubt would have been enough to eliminate most people encountered by [the officer] after he received the broadcast. But [the plaintiff] was not most people. He was in the right place at the right time, he was running and he appeared to be taking avoiding action."

At trial in British Columbia Supreme Court the judge found the breach of the peace arrest was lawful based on the plaintiff's conduct in loudly protesting his detention and drawing attention to himself. The officer had articulable cause to detain the plaintiff for investigative purposes and had reasonable grounds to suspect that the plaintiff was connected to a particular crime (an assault or attempted assault of the Prime Minister) and believed that his detention was necessary based on the police radio broadcasts, the fact the plaintiff was running and appeared to be avoiding the officer, and the plaintiff's clothing more or less matched the clothing described in the first police radio broadcast. The initial detention was therefore not a s.9 breach and handcuffing him did not amount to the tort of assault or battery because there were reasonable grounds to believe that the plaintiff may attempt to escape or assault the officer.

The trial judge, however, found that police officers breached the plaintiff's *Charter* rights by keeping him in the police lockup longer than was necessary (wrongful imprisonment), and by seizing his car. He was awarded $5,000 for the detention and $100 for the seizure of the car. The judge also found that corrections officers breached the plaintiff's *Charter* rights by conducting an unreasonable strip search of his person and another $5,000 was awarded.

The plaintiff appealed, among other findings, the trial judge's ruling in holding the arrest lawful. Although he agreed that the police could stop him or delay him for a short time without breaching his right under s.9 of the *Charter* because they had reasonable grounds or articulable cause to stop him for investigative purposes, he contended that once

the detaining officer very quickly knew that he did not fit the description of the person sought in the radio broadcast there was no reason to detain him any further. Therefore, he submitted that the grounds for detention quickly evaporated and the officer was obliged to let him go. And since he was not released at this point, he argued that he was protesting his unlawful continuing detention and his actions could not form the basis for the breach of the peace arrest. Thus, in the plaintiff's opinion the arrest was unlawful.

Jutsice Lowe, writing the unanimous decision on this issue for the British Columbia Court of Appeal, concluded that the arrest was lawful. In his view, all that was known to the officer as well as the plaintiff's conduct must be taken into account. In concluding the trial judge did not err in finding that the plaintiff's continued detention was reasonable and justified, Justice Lowe wrote:

> [W]hile discussing the grounds for the arrest of [the plaintiff], the trial judge observed that although [the plaintiff's] clothing was fairly close to the description of the suspect's clothing, "his height, hair colour and length, and age were all different...". [The plaintiff] contends that this finding should have led the judge to conclude that there was no reasonable basis for his continued detention before he protested in such a manner that would otherwise amount to a breach of the peace.
>
> I disagree. The argument ignores the second factor taken into account by the judge in reaching the above conclusion - [the plaintiff] was running and appeared to be avoiding interception. (The trial judge noted earlier in his reasons that [the officer] yelled at [the plaintiff] to stop but [the plaintiff] kept running.) ... Dissimilarities between a suspect's physical description and the physical appearance of the person being detained are not necessarily enough to allay reasonable suspicion. The investigating officer could not safely conclude that the broadcast description was completely accurate. The dissimilarities between description and appearance no doubt would have been enough to eliminate most people encountered by [the officer] after he received the broadcast. But [the plaintiff] was not most people. He was in the right place at the right time, he was running and he appeared to be taking avoiding action. [paras. 16-17]

Since the continued detention was unlawful, the arrest for breach of the peace was valid. The plaintiff's appeal was dismissed.

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

**Editor's Note:** Appeal of this case to the Supreme Court of Canada has been granted.

# Court Side:

"The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail — its roof may shake — the wind may blow through it — the storm may enter — the rain may enter — but the King of England cannot enter! — all his force dares not cross the threshold of the ruined tenement!" — William Pitt, British Parliament, 1763

# ACADEMIC EXCERPT:

"[The confessions rule] offers some protection against two dangers: that innocent people will be convicted on the strength of false confessions, and that interrogated suspects will be treated unfairly." - Lisa Dufraimont, "The Common Law Confessions Rule in the Charter Era: Current Law and Future Directions" in Jamie Cameron & James Stribopoulos, eds., The Charter and Criminal Justice: Twenty Five Years Later (Markham: LexisNexis Canada Inc., 2008) 249 at 269.

# OTHER PROVINCIAL EMERGENCY VEHICLE SAFETY STATUTES

## Alberta

s.115(2) *Traffic Safety Act*

A person shall not do any of the following: ... (t) subject to subsection (4), drive a vehicle on a highway at a speed greater than 60 kilometres per hour, or the maximum speed limit established or prescribed for that highway ..., whichever is lower, if the vehicle (iv) is travelling on the same side of the highway as a stopped emergency vehicle ..., and (v) is passing the stopped emergency vehicle ... when its flashing lamps are operating.

.....

(4) Subsection (2)(t) does not apply if there are 2 or more traffic lanes for traffic moving in the same direction as the vehicle and there is at least one traffic lane between the driver's vehicle and the stopped emergency vehicle ... .

## Saskatchewan

s.204(1) *Traffic Safety Act*

No person shall drive a vehicle on a highway at a speed greater than 60 kilometres per hour when passing an emergency vehicle that is stopped on the highway with its emergency lights in operation.

(2) Subsection (1) does not apply if: (a) the vehicle is being driven on a divided highway; and (b) the vehicle is travelling on the opposite roadway from the emergency vehicle.

## Nova Scotia

s.106B(1) *Motor Vehicle Act*

A person commits an offence who exceeds the speed limit ... in an area in proximity to an emergency vehicle exhibiting a flashing light by (a) between one and fifteen kilometres per hour, inclusive; (b) between sixteen and thirty kilometres per hour, inclusive; or (c) thirty-one kilometres per hour or more.

# Manitoba

s.109.1(2) Highway Traffic Act

When approaching an emergency vehicle with its emergency beacon lighted that is stopped on a highway, the driver of a vehicle travelling on the same side of the highway (a) shall slow down and proceed with caution to ensure that his or her vehicle does not collide with the emergency vehicle or endanger any person outside of the emergency vehicle; and (b) shall pass the emergency vehicle only if it is safe to do so.

(3) In addition to complying with subsection (2), the driver shall move into a traffic lane farther from the emergency vehicle if (a) he or she is travelling in the lane in which the emergency vehicle is stopped, or a lane adjacent to it; (b) there are two or more traffic lanes on the side of the highway on which the emergency vehicle is stopped; and (c) the movement can be made safely.

# Prince Edward Island

s.115.1(1) Highway Traffic Act

No person shall drive a motor vehicle on a highway at a speed greater than half the posted speed limit when approaching or passing an emergency vehicle that is stopped on the highway with its emergency lights in operation.

(2) Where (a) the driver of a motor vehicle approaches an emergency vehicle that is stopped on a highway with its emergency lights in operation; (b) there are two or more lanes of traffic on the same side of the highway on which the emergency vehicle is stopped; and (c) the driver of the motor vehicle is travelling in the same lane that the emergency vehicle is stopped in or in a lane that is adjacent to the emergency vehicle, the driver shall, in addition to reducing speed as required by subsection (1), move into another lane if the movement can be made in safety.

# Ontario

s.159.1(1) Highway Traffic Act

Upon approaching an emergency vehicle with its lamp producing intermittent flashes of red light or red and blue light that is stopped on a highway, the driver of a vehicle travelling on the same side of the highway shall slow down and proceed with caution, having due regard for traffic on and the conditions of the highway and the weather, to ensure that the driver does not collide with the emergency vehicle or endanger any person outside of the emergency vehicle.

(2) Upon approaching an emergency vehicle with its lamp producing intermittent flashes of red light that is stopped on a highway with two or more lanes of traffic on the same side of the highway as the side on which the emergency vehicle is stopped, the driver of a vehicle travelling in the same lane that the emergency vehicle is stopped in or in a lane that is adjacent to the emergency vehicle, in addition to slowing down and proceeding with caution as required by subsection (1), shall move into another lane if the movement can be made in safety.

(3) Nothing in subsection (1) or (2) prevents a driver from stopping his or her vehicle and not passing the stopped emergency vehicle if stopping can be done in safety and is not otherwise prohibited by law.

# POLICE CANNOT RELY ON POST ARREST INFORMATION TO SUPPORT REASONABLE GROUNDS

## R. v. Montgomery, 2009 BCCA 41

Police received a report that a past member of the Hells Angels, together with 15 associates, had entered a cabaret. The police made inquiries about a vehicle at the cabaret in which some of these associates were passengers and were advised by an officer from another police department that the Delta company owning the vehicle was known to be involved in criminal activities, including the sale of drugs. The next day police received a complaint from a citizen that considerable traffic was coming and going to and from a residence, which had recently changed hands, and that the traffic included expensive vehicles at "weird" times of night. A few days later police stopped a vehicle driven by the accused that was registered to the Delta company. During the following week police made two observations connecting the accused to the residence. The vehicle driven by the accused was seen at the property and the accused was seen attending the property.

Police then received a couple of tips. An anonymous one that a new group of people, calling themselves Easy Money Production and supposedly associated with the Hells Angels, had come to the area to take over the drug trade. A second confidential tip reported that the group gave out business cards in the name of Easy Money Production with phone numbers to call for the purpose of arranging to buy drugs. This tip also reported that the group carried handguns and had no problem in using force to have local dealers join them and to collect money. The source said the group utilized a method by which a three-person team, who were not allowed to fight but were protected by enforcers with guns, would be involved in each drug sale - one person carried the drugs, a second carried the money and a third completed the transaction. The source also provided the cell phone number and pager number shown on the business cards of Easy Money Production.

The lead investigator attended the residence and observed, among other things, a red van parked outside. Later in the afternoon the investigator called the cell phone number he had been told was on the business cards of Easy Money Production and told the male who answered the cell phone that he wanted to buy a big one - drug jargon for a gram of cocaine. The male told the officer to meet at a nearby McDonald's restaurant in about seven minutes and that he would be driving a red car or van. When the investigator arrived at the McDonald's restaurant several minutes later, he saw a red van enter the parking lot. He recognized the van as the vehicle he had seen at the residence earlier in the day and observed the occupants of the van turning their heads as if they were looking for someone. When the van left the parking lot, the investigator decided to stop the van and used a loud hailer to tell the occupants to stay in the vehicle. When backup arrived 10 minutes later, the occupants of the van were ordered out and arrested for possession for the purpose of trafficking and read their *Charter* rights. The accused indicated that he wanted to contact counsel and named a specific lawyer. But he was not permitted to contact the lawyer at the place of his arrest because the police had a policy against arrested persons using cell phones at the scene of an alleged crime.

> " Section 9 of the Charter provides that a person has the right not to be arbitrarily detained or imprisoned. The police must have articulable cause or a reasonable suspicion (as opposed to a hunch) that a person is connected to a crime before detaining the person for investigative purposes. There must be reasonable and probable grounds, both subjectively and objectively, that a person has committed a crime before the police may make a warrantless arrest of the person."

Police seized two half-gram bags of cocaine from one of the

men, and $2,000 cash and a key to a safe from the accused. The accused arrived at the police station approximately one hour after the red van was stopped. He was read his *Charter* rights again and reiterated his wish to contact a specific lawyer. Three hours later, he was given a phone for the purpose of receiving a lawyer's call but it was not the lawyer he had specified. After another 20 minutes, a call was placed on the accused's behalf to the specified lawyer and he spoke with that lawyer when the call was returned a little over an hour later.

The police obtained and executed a warrant to search the residence later on the same day. Among the items seized were cocaine, a handgun, a police scanner, and a tenancy agreement for the residence showing the accused as the tenant, but no safe was located. The phone at the residence rang while the police were executing the search warrant and an officer answered it. The caller told him that everyone had been busted and that two houses had been raided by the police. The officer questioned the caller about the second house and later, back at the police station, the accused admitted he lived at a second property. The police then applied for a search warrant for the second property and found four ounces of cocaine and a safe containing a bulletproof vest and a handgun there.

At trial in British Columbia Supreme Court the trial judge held that the accused's rights had not been breached and the evidence was admissible. The accused was convicted of possessing cocaine for the purpose of trafficking, careless storage of a firearm, and possessing a loaded restricted firearm without an authorization.

The accused appealed his conviction to the British Columbia Court of Appeal arguing, among other grounds, his right under s.9 of the *Charter* was breached because the police did not have reasonable grounds for his arrest, that his right under s.10(b) was violated when he was not given the right to consult counsel without delay following his arrest, and that he was not read his *Charter* rights again or given the opportunity to speak with his lawyer again after there was a change in the jeopardy he faced.

## Arrest

As for the reasonable grounds issue, Justice Tysoe, authoring the unanimous opinion, first noted the law and its connection to arrest:

> Section 9 of the *Charter* provides that a person has the right not to be arbitrarily detained or imprisoned. The police must have articulable cause or a reasonable suspicion (as opposed to a hunch) that a person is connected to a crime before detaining the person for investigative purposes. There must be reasonable and probable grounds, both subjectively and objectively, that a person has committed a crime before the police may make a warrantless arrest of the person. [references omitted, para. 24]

Here, "the police did not detain the [accused] for investigative purposes; they initially detained him for the purpose of arresting him and they continued his detention following his arrest," said Justice Tysoe. "The issue is whether there were reasonable and probable grounds for the arrest of the [accused] and, if not, whether the detention was arbitrary."

The investigator said he believed that he had grounds to arrest the occupants of the red van for possessing a controlled substance for the purpose of trafficking. And the trial judge concluded the officer objectively had reasonable grounds to arrest the accused because of the following:

1. an organization associated with the Hell's Angels was openly endeavouring to take over the drug trade in the area.
2. in doing so, they possessed handguns and were prepared to resort to violence.
3. they operated as a team with different duties relegated to different persons. One carried the drugs and one carried the money. A third was responsible for enforcement duties.
4. at an earlier time the accused was found driving a vehicle owned by a company associated with criminal activity.
5. members of the organization passed out business cards in the name of "Easy Money Productions" containing a phone number.

6. some members of the organization resided at the first targeted residence, a residence which contained illicit drugs and weapons. Activity consistent with drug trafficking was observed.
7. a red van was seen parked at that residence shortly before the investigator made his Dial-A-Dope call.
8. that call was made to a number which the investigator had reasonable and probable grounds to believe was the number on the business card handed out by this organization.
9. minutes after the drug buy was arranged for the McDonald's restaurant, the same red van that had been seen at the residence arrived at the agreed upon location.
10. consistent with the practice of those selling drugs in this manner, the van moved quickly through the parking lot without stopping. The occupants of the van were craning heads as they passed through the parking lot, consistent with such a practice in an effort to locate their client while avoiding drug rip-offs or police.
11. the presence of four individuals in the vehicle that departed the residence minutes earlier was consistent with information that the organization delegated different duties to a number of people in a drug transaction.
12. consistent with that practice the accused was found with over $2,000 in three bundles in his possession on his arrest and another passenger was found with cocaine in an amount consistent with that ordered by the investigator.

The Appeal Court ruled the trial judge improperly relied on evidence discovered after the accused's arrest (see underlining above) in concluding that objective grounds existed. He should not have relied on the discovery of drugs and weapons in the residence after it was searched or the drugs and cash that were found on the occupants of the van after they were arrested. However, even without this information the remaining factors known to the officer objectively provided reasonable grounds that the accused was participating in the offence of trafficking in cocaine.

This was not a case where the police had not observed or initiated a drug transaction and were relying on nothing more than the information provided by the informant. Rather, in addition to the information provided by tips and observations made by the police, the investigator had initiated a drug transaction by pretending to arrange for the purchase of cocaine, and the vehicle in which the accused was a passenger arrived at the place and within the time frame arranged for the consummation of the transaction. And even though the accused was a stranger to the investigator, there were reasonable grounds to believe he was participating in a joint enterprise involving the sale of cocaine. "While there was a possibility that the [accused] had been a hitchhiker, it was rather remote in view of the fact that he was sitting in the front passenger's seat of a vehicle containing two other passengers in the back seat," said Justice Tysoe. Since there were reasonable grounds, both subjectively and objectively, for the accused's arrest, his right under s.9 of the *Charter* was not violated.

> "Section 10(b) of the Charter provides that an arrested or detained person has the right to retain and instruct counsel without delay and to be informed of that right. ... If an arrested person indicates that he or she wishes to exercise the right to counsel, the police have the duties, except in urgent or dangerous circumstances, to provide the person with a reasonable opportunity to exercise the right, and to refrain from eliciting evidence from the person until he or she has had a reasonable opportunity to retain and instruct counsel."

## Right to Counsel

The accused contended the police violated his s. 10(b) *Charter* right because they failed to allow him to call from a cell phone at the scene of his arrest and that there was an unacceptable delay of three hours and twenty minutes between the time he was brought to the police station and the time a call was placed to the lawyer he had specified. In rejecting this ground of appeal Justice

Tysoe described the right to counsel under s.10(b) as follows:

> Section 10(b) of the Charter provides that an arrested or detained person has the right to retain and instruct counsel without delay and to be informed of that right. ...
>
> If an arrested person indicates that he or she wishes to exercise the right to counsel, the police have the duties, except in urgent or dangerous circumstances, to provide the person with a reasonable opportunity to exercise the right, and to refrain from eliciting evidence from the person until he or she has had a reasonable opportunity to retain and instruct counsel. [references omitted, paras. 32-33]

"The police considered the arrest to be one of high risk. The [accused] was believed to be associated with an organization that used violence. It would have been difficult for the police to ensure that the call was not used for an improper purpose and to provide the [accused] with privacy at the scene of his arrest while ensuring that he was secure."

In agreeing with the trial judge that it was neither reasonable nor practical to allow the accused to use a cell phone at the scene of his arrest, Justice Tysoe stated:

> The police considered the arrest to be one of high risk. The [accused] was believed to be associated with an organization that used violence. It would have been difficult for the police to ensure that the call was not used for an improper purpose and to provide the [accused] with privacy at the scene of his arrest while ensuring that he was secure.
>
> The police station had only one private phone for conversations with lawyers, and the police had to deal with the three other men arrested with the [accused], as well as an unrelated matter. The trial judge made the finding of fact that the [accused] was provided access to counsel as soon as was reasonably possible in all of the circumstances. I am not persuaded that the judge made a palpable error in making this finding. [paras. 35-36]

Justice Tysoe also noted the police neither attempted to elicit evidence from the accused nor received any information from him before he spoke with his lawyer.

As for the accused's contention that he should have been re-advised of his *Charter* rights when the investigation changed from one involving a "dial-a-dope" operation to one involving a "stash" or "stockpile" of cocaine, it was rejected. "There was not a change in jeopardy that resulted in a violation of s. 10(b)," said Justice Tysoe. "The purpose of the search warrant was to search the [second] residence for cocaine and implements related to the intended charge of trafficking in cocaine. There was no change in the intended charge prior to the execution of the search warrant. Although the police expected to find a greater amount of cocaine at the [second] residence than had been seized from one of the occupants of the red van at the time of the arrest, the accused was not exposed to a materially different sentence as a result of the additional cocaine being located." The accused's appeal was dismissed.

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

# Court Side:

"Expecting police officers to ask 'clarifying questions,' when it is unclear whether a suspect is competent to waive the right to counsel, should become a routine aspect of sound police practice in Canada." *A Review of Brydges Duty Counsel Services in Canada*, s. 8.7 Education & Training, Department of Justice Canada.

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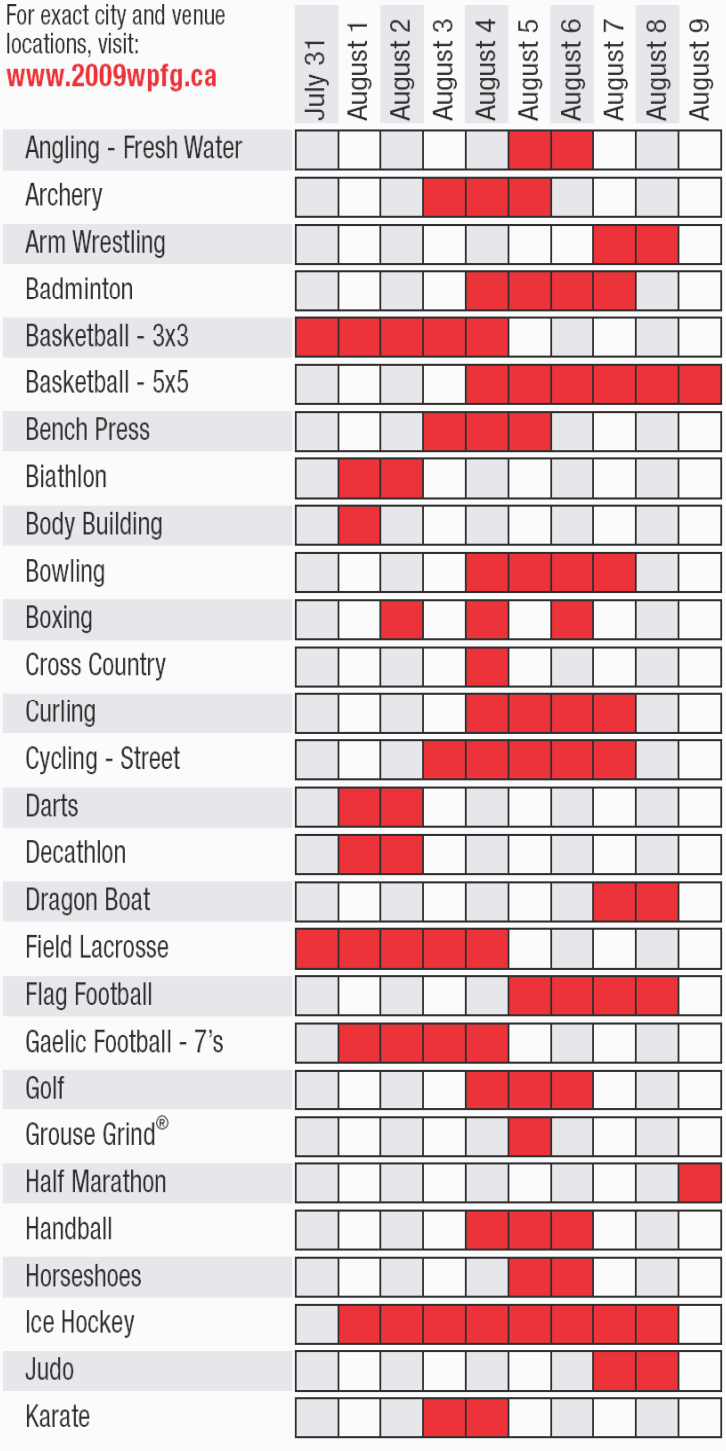


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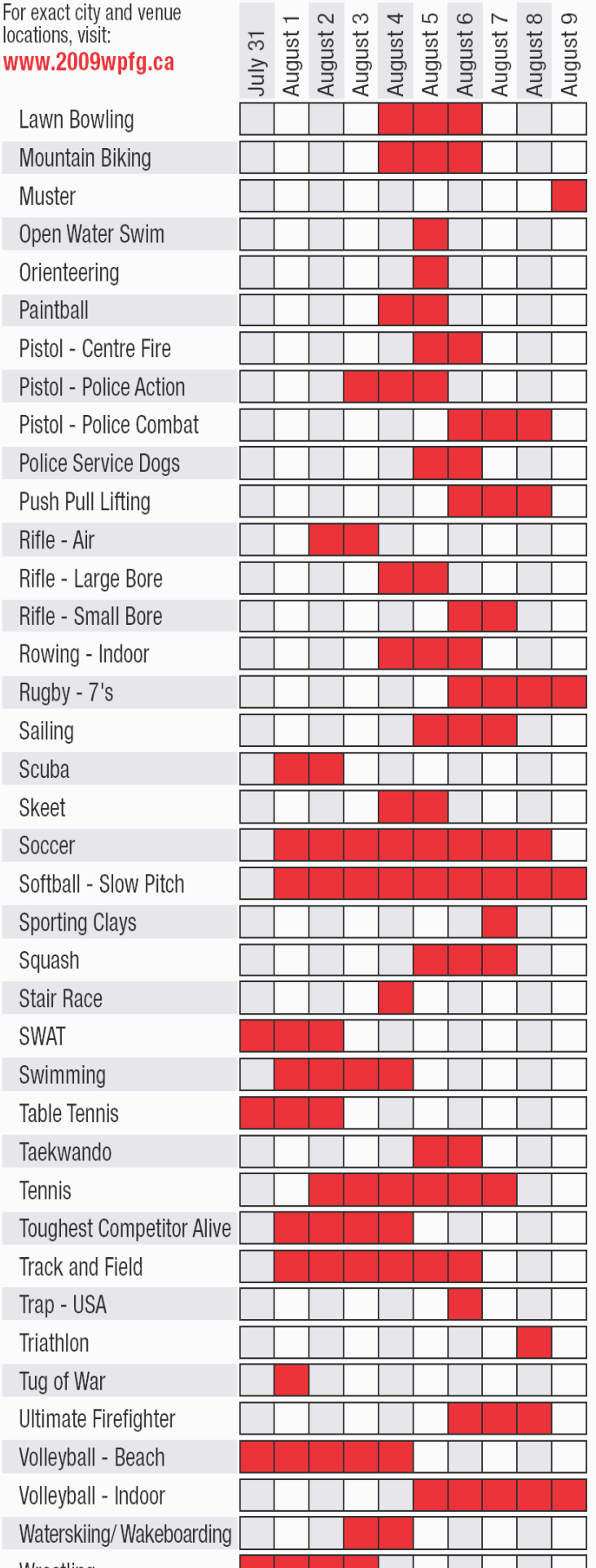

# UNDERTAKING CONDITIONS EFFECTIVE DESPITE PTA INVALIDATION

## R. v. Oliveira, 2009 ONCA 219

The accused was arrested for assaulting a police officer and failing to provide a roadside breath sample. He was released on a promise to appear requiring him to attend court at a later date and he also entered into an undertaking which included a condition that he abstain from consuming alcohol. About a month later, just three days before the accused's first court appearance, the information alleging the offences was sworn and the promise to appear was confirmed. About two weeks later a police officer stopped the accused as he was walking down the street and, believing he had been drinking, arrested him for breaching the no consume condition of his undertaking. The next day he again appeared in court on the assault and refusal charges.

At his breach of undertaking trial in the Ontario Court of Justice the trial judge accepted that the information containing the initial charges of assault and refusing to provide a breath sample had not been laid "as soon as practicable" as required by s. 505 of the *Criminal Code*, rendering the promise to appear of no force and effect. The Crown submitted, however, that the undertaking remained valid as long as the charges on which the accused had been released were before the court. The trial judge concluded the promise to appear and the undertaking were in essence a single release document - one setting out the attendance requirements and the other setting out the conditions or restrictions - and that the undertaking existed only as long as the promise to appear remained valid. Since the promise to appear was rendered a nullity the undertaking related to that promise to appear was also a nullity. The accused was acquitted on the breach charge. A Crown appeal to the Ontario Superior Court of Justice was dismissed.

The Crown then appealed to the Ontario Court of Appeal arguing the lower courts improperly concluded that the promise to appear and the undertaking were so closely tied that an action rendering the promise to appear a nullity must render the undertaking a nullity. Justice Doherty, authoring the unanimous appeal court decision described the current process for police release as follows:

> Part XVI of the Criminal Code sets out a detailed procedural scheme governing the laying of criminal charges and the arrest, detention and release of persons charged with criminal offences. Among other purposes, Part XVI seeks to minimize, to the extent consistent with the public interest, the pre-trial incarceration of persons charged with criminal offences. To achieve that goal, several provisions of Part XVI permit a peace officer to release an individual, thereby avoiding the need to hold that person in custody pending appearance before a judicial officer: see Criminal Code, ss. 496, 498, 499, 503(2).
>
> A peace officer who arrests an accused may release that person on a promise to appear. That document compels the named person to appear in court on a specified date in answer to the charge set out in the promise to appear: *Criminal Code*, s. 501. Failure to appear as required is a criminal offence: *Criminal Code*, s. 145(5).
>
> If an accused is released on a promise to appear, two steps are necessary to bring the criminal charges before the court. First, an information alleging the offence(s) must be laid before a justice "as soon as practicable" and "in any event before the time stated in the ... promise to appear": *Criminal Code*, s. 505. Failure to lay the information "as soon as practicable" renders the promise to appear ineffective and provides a defence to a charge of failure to appear as directed by the promise to appear.
>
> The second step necessary to move the criminal charges forward also takes place when the information is laid before the justice of the peace. The justice of the peace must decide whether to confirm or cancel the promise to appear. If he or she cancels

> the promise to appear, it is of no force and effect, the accused is not required to appear at the time and place set out in the promise to appear, and failure to appear is not a criminal offence. A justice of the peace may cancel a promise to appear for various reasons. For example, the justice of the peace may conclude that the criminal charge(s) should not have been brought against the accused, or that some other process should be used to compel the attendance of the accused: Criminal Code, s. 508.
>
> Although the promise to appear and other similar mechanisms for release by the police introduced into the *Criminal Code* by the *Bail Reform Act* ... gave the police broad powers of release, those powers were deficient in that they did not permit the police to impose conditions as a term of the release. Unless the police were satisfied that the arrested person should be released without any conditions, they had to detain that person pending appearance before a justice of the peace. The justice of the peace could then release that individual on the appropriate bail conditions. This shortcoming was eventually cured by amendments that gave a peace officer who released the person on a promise to appear, the power to require that person to enter into an undertaking before being released: *Criminal Code*, s. 503(2). That undertaking could contain one or more of the conditions set out in s. 503(2.1) of the *Criminal Code* and is aptly described as "police bail". [references omitted, paras. 2-6]

When an accused is charged with the crime of breaching an undertaking, the Crown must prove beyond a reasonable doubt that the undertaking was in force on the date of the alleged breach - an essential component of the *actus reus*. So the issue of whether the undertaking was in force on the date of the alleged breach was critical. Justice Doherty described the connection between the PTA and the undertaking as follows:

> The promise to appear and the undertaking given to a peace officer are closely related documents. Taken together, they are an integral part of the "police bail" provisions in Part XVI of the Criminal Code. I cannot, however, agree with the trial judge that the two documents are "in essence a single release document". The documents serve two very different purposes.
>
> The purpose of the promise to appear is to secure the initial attendance of the accused in court. Subsequent court attendances are pursuant to court orders. A defect in the promise to appear, or the process required to confirm a promise to appear, will not affect the validity of the information charging the offences referred to in the promise to appear. Nor will those defects affect the Crown's ability to proceed on the charges referred to in the promise to appear, or the ultimate disposition of those charges: see *Criminal Code*, ss. 485(2), (3). In short, after the first appearance of an accused, the promise to appear is largely irrelevant to the criminal process.
>
> The undertaking serves a very different purpose. It constitutes a promise by the accused to comply with certain conditions in exchange for his release from custody pending the resolution of the charges. The conditions in the undertaking are put in place to protect the public by providing some measure of control over an accused's conduct while the criminal proceedings are extant. Subject to variation of the undertaking through the review procedures set out in the *Criminal Code* (see ss. 503(2.2), (2.3)), the terms of the undertaking, like the terms of most forms of judicial bail, remain in full force and effect until the accused is tried and, if convicted, sentenced: *Criminal Code*, s. 523(1)(b).
>
> The purpose of an undertaking, and the rationale underlying the peace officer's power to release on an undertaking, link that document, not to the initial attendance in court of the accused, but to the criminal charges on which the accused was released as those charges progress to disposition. Viewed purposively, the life of the undertaking should be tied to the life of the charges giving rise to the undertaking. The

> language of s. 523(1)(b) makes that link. [paras. 29-32]

Here, the charges on which the accused was released on his undertaking were before the court on the date of the alleged breach of his undertaking. The court had both jurisdiction over the accused as well as the offences for which he had been released on his undertaking. The allegations were making their way through court and the justification for the undertaking - to secure the accused's good behaviour pending the outcome of the charges against him - remained as valid the day he was allegedly in breach as the day he was released. And the Appeal Court also rejected the accused's submission that if the undertaking survived after the promise to appear was rendered invalid an accused could remain subject to an undertaking issued by a peace officer for an indefinite period of time when there were no longer any charges against that accused. "The undertaking cannot survive if the charges giving rise to the undertaking are no longer before the court," said Justice Doherty. He continued:

> Not only does a purposive examination of the promise to appear and the undertaking tell me that the two documents should not share a common lifespan, the relevant provisions of the Criminal Code support the same conclusion. The promise to appear is ineffective unless an information is laid in compliance with s. 505 and the promise to appear is confirmed by a justice of the peace pursuant to s. 508. These requirements reflect the policy that no person should be compelled to attend court in answer to a criminal charge unless the judicial officer has reviewed that charge and determined that the accused should be required to come to court. The legal enforceability of the promise to appear depends on placing an information before a justice of the peace in compliance with s. 505 and the confirmation of the appearance notice in compliance with s. 508. The accused's legal obligation to attend court in compliance with the promise to appear, therefore, does not crystallize until some time between the date on which the accused is released on the promise to appear, and the date on which he is actually required to appear.
>
> The language of s. 145(5) makes the delayed enforceability of the promise to appear clear. The offence created by that section provides that the promise to appear must have been "confirmed by a justice under section 508" before failure to appear as required by that document will constitute an offence.
>
> In contrast to the delayed enforceability of the promise to appear, an undertaking issued by a peace officer is effective immediately. The undertaking is in full force and effect even before the information relating to the charges in the undertaking is laid pursuant to s. 505 and the appearance notice is confirmed pursuant to s. 508. Non-compliance with an undertaking at any time after it is issued is a criminal offence.
>
> The immediate enforceability of the undertaking is clear from the language of s. 145(5.1), the section which creates the offence of non-compliance with an undertaking issued by a police officer. ...
>
> Not only do the *Criminal Code* provisions provide that the undertaking is effective and binding on an accused before a promise to appear is validated, but nothing in the relevant provisions of the *Criminal Code* ties the enforceability of the undertaking to the validity of the promise to appear. To the contrary, s. 523(1) expressly ties the ongoing enforceability of the undertaking to the continued prosecution of the offence, or a related offence, on which the accused was released on the undertaking. [references omitted, paras. 35-39]

The invalidity of the promise to appear caused by the failure to lay the information "as soon as practicable" did not render the undertaking void or otherwise ineffective and its life was tied to the existence of the ongoing criminal proceedings in respect of the charges that gave rise to the undertaking. The Crown's appeal was allowed, the accused's acquittals were set aside, and convictions were substituted.

Complete case available at www.ontariocourts.on.ca

# BORDER ASD TESTS TREATED NO DIFFERENTLY THAN ROADSIDE DEMANDS

## R. v. Bilawey, 2009 SKCA 9

The accused was returning from a trip to Eastern Canada via the United States when he arrived at a port of entry in Saskatchewan. He admitted to the Border Services Officer (BSO) at the primary inspection window that he had alcohol in his possession and that he had been in the United States for less than 48 hours. He was asked to park his vehicle and go inside to pay duties and taxes on the alcohol. The BSO working the secondary inspection area smelled the odour of an alcoholic beverage when the accused presented himself at the counter. The accused's speech and movement were affected somewhat so the accused was requested to go to an interview room with the intention of making further inquiries about his alcohol consumption and request that he provide a sample of his breath for analysis.

The BSO made an approved screening device (ASD) demand, including an admonition that refusal or failure to comply with the demand was a criminal offence and rendered a person liable to criminal charges. The accused said that he understood the demand and he was instructed to provide a smooth, steady stream of air into the device and to continue blowing until he was told to stop. After five unsuitable attempts to provide a sample, the accused was arrested for refusing to supply a sample of his breath and advised of his right to contact legal counsel. He was offered and accepted an opportunity to call Legal Aid counsel. After speaking to the lawyer he asked for another opportunity to provide a suitable sample but was told he had been given five opportunities already and that his failure to provide a suitable sample constituted a refusal.

At trial in Saskatchewan Provincial Court the trial judge found the accused did not have a right to contact a lawyer before blowing into the approved screening device. He held that it was implicit in the legislative provisions that the roadside detention of a person for the purpose of complying forthwith to an ASD demand did not engage the right to counsel. This limitation was justified under s.1 of the *Charter* given the important role of the screening device in society's fight against impaired drivers. The accused was convicted of refusing to provide a breath sample under s.254(2) of the *Criminal Code*. An appeal to the Saskatchewan Court of Queen's Bench was dismissed. The appeal judge found the case law clearly established that ASD demands made at ports of entry, where the test could be administered without delay, would not be treated differently from roadside demands simply because telephones were readily available at border offices.

The accused then appealed to the Saskatchewan Court of Appeal which had to answer the question of whether an individual must be afforded a reasonable opportunity to contact legal counsel, as contemplated by s.10(b) of the *Charter,* when a demand is made under s. 254(2) to an individual at a border crossing and a telephone is immediately at hand. Justice Wilkinson, delivering the judgment of the Appeal Court, agreed with the Queen's Bench and rejected the accused's argument that a detainee should reasonably be able to extend the time for complying with the demand in order to consult with legal counsel. Instead, the Court concluded that the exclusion of the right to counsel was a reasonable limit under s.1 of the *Charter* as demonstrably justified in a free and democratic society. In this case there was no delay in making the demand or administering the tests and since the test was to be administered forthwith, the proximity of a phone did not impact the validity of the demand.

Complete case available at www.canlii.org

# BY THE BOOK:


s.1 Charter "The [Charter] guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

# BLOOD SAMPLE READINGS OTHERWISE DISCOVERABLE - BY BREATH SAMPLE

## R. v. Farrell, 2009 NSCA 3

The accused was involved in a single vehicle motor vehicle accident around 10:00 am when her vehicle was overturned in a ditch. As the fire department removed her from the vehicle a police officer arrived at the scene. The accused's nephew told the officer that his aunt had a history of drinking and driving. She was heard screaming that she was in pain as she was strapped to a backboard. An ambulance attendant gestured in a manner that the officer interpreted to mean that the accused had been drinking. The officer approached the accused and detected an odour of alcohol. He accompanied her in the ambulance as she was transported to hospital and he formed the opinion that there were sufficient grounds to demand that she supply a sample of her breath or blood. He was also of the opinion that she would be at the hospital for some time while she was being examined and treated by medical staff. The officer read a demand for a blood sample and advised the accused of her right to counsel, which she decided not to exercise. The emergency room physician subsequently took a sample of blood which indicated a reading of 247 mg%.

> "It is well established that s. 254(3) requires that the police officer subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief..."

At trial in Nova Scotia Provincial Court the judge concluded that although the officer had the necessary grounds to demand a breath sample, he did not have reasonable and probable grounds to believe that the accused's physical condition made it impracticable to obtain a sample of her breath. He found that the officer formed the intention to make the blood demand shortly after arriving at the accident scene and before he had any clear indication of the extent of the accused's injuries. He also found the officer did not ask the attending physician if she was able to provide a breath sample. The judge held the blood sample evidence had been obtained as a result of an unconstitutional search and seizure under s.8 of the *Charter* and excluded the certificate of analysis under s.24(2). She was acquitted of impaired driving and driving over 80mg %.

The Crown's appeal to the Nova Scotia Supreme Court was successful. The appeal judge determined that the trial judge focussed on the officer's opinion at the accident scene, rather than whether or not the officer had a proper basis to make the demand at the time the demand was given at the hospital. The accused's complaint of injury was to her back and hip, which meant she could not leave the hospital. When asked about treatment, the doctor said that it was going to be a while. The appeal judge was satisfied that it was appropriate for the officer to give the blood demand - he had reasonable grounds that the accused could not give a breath test because she was stuck in the hospital. A new trial was ordered.

The accused then appealed to the Nova Scotia Court of Appeal arguing the appeal judge erred by substituting his view of the evidence for that of the trial judge and in concluding that the trial judge did not consider whether reasonable and probable grounds for a blood demand versus a breath demand existed at the time of the actual demand. The Crown submitted that, if the appeal judge erred, the trial judge erred in the s.24(2) analysis in excluding evidence of the analysis of the accused's blood.

### Reasonable Grounds

Justice Roscoe, writing the opinion for the Nova Scotia Court of Appeal first examined the law concerning the demand for blood samples under ss. 254(3) and (4) of the Criminal Code:

> It is well established that s. 254(3) requires that the police officer subjectively have an honest belief that the suspect has committed

> the offence and objectively there must exist reasonable grounds for this belief. ...
>
> In addition to having reasonable and probable grounds to believe that an offence has been committed, prior to making a demand for a blood sample, the police officer must also have reasonable and probable grounds to believe that because of the person's physical condition, there is either an incapacity to provide a sample of breath, or it would be impracticable to obtain a breath sample. It is common ground on this appeal that the belief of the police officer that the person is incapable or it is impractical to obtain a breath sample must be held at the time the demand for blood is given. [reference omitted, paras. 11-12]

" In addition to having reasonable and probable grounds to believe that an offence has been committed, prior to making a demand for a blood sample, the police officer must also have reasonable and probable grounds to believe that because of the person's physical condition, there is either an incapacity to provide a sample of breath, or it would be impracticable to obtain a breath sample. ... [T]he belief of the police officer that the person is incapable or it is impractical to obtain a breath sample must be held at the time the demand for blood is given."

In this case, Justice Roscoe was of the view that the appeal judge erred by substituting his view of the evidence for that of the trial judge. The trial judge did consider the officer's belief at the time of the accident, but he also went on to consider the situation at the hospital. He quoted the relevant section of the *Criminal Code* and recognized that the timing of the police officer's belief was important. The trial judge found that the officer did not consider giving a breath demand at any time and, although the trial judge concluded that the officer had made up his mind at the accident scene, it is clear that he also considered the officer's thinking at the time he made the demand. Justice Roscoe held the trial judge's findings were reasonable and supported by the evidence. He said:

> It is clear that the trial judge considered both the officer's thinking at the time of the accident and again at the hospital when the demand for blood samples was made. The finding that the officer never considered the possibility of [the accused] providing a sample of breath is reasonable and consistent with the evidence. As well, the evidence supports the finding that [the officer] did not ask the doctor if [the accused] could provide a breath sample, he only asked her if she was capable of providing a blood sample. Nor did he ask [the accused] if she thought she was capable of providing a breath sample. That [the officer] made up his mind at the scene of the accident to seek a blood sample as soon as possible after arriving at the hospital and did not reassess the situation at the hospital is also a reasonable inference to draw from the evidence. Furthermore, the trial judge's finding that the officer's prime consideration was obtaining evidence before two hours passed, was also reasonable. [para. 20]

## Admissibility

Justice Roscoe reversed the trial judge's ruling in excluding the evidence. Although the blood sample was conscriptive evidence, which will generally render a trial unfair, the evidence was discoverable by an alternative means - a breath sample. The officer had the legal justification to demand a breath sample. "It is a rational inference from the evidence that if [the accused] was prepared to consent to giving a blood sample, that she would have consented to providing a breath sample if she were capable of doing so," said Justice Roscoe. "Providing a breath sample is less intrusive than allowing a sample of blood to be drawn." He continued:

> In this case, since the [accused] agreed to provide a blood sample it is logical to assume that if she had been capable of providing a breath sample, she would have consented to that procedure. If [the officer] had asked the doctor if [the accused] was

> capable of providing a breath sample and the answer was "yes", presumably he would have made arrangements for a breath sample to be taken. If the answer was "no" she was not capable because of her medical condition, the blood sample would have been legally provided in accordance with the legislation. In either case, if it was not practicable to obtain a sample of breath, the pre-conditions for obtaining a blood sample would have been met. I agree ... that the evidence in question was probably discoverable in any event and therefore its admission would not offend against trial fairness. [para. 3]

The breach also fell somewhere between a serious one and a technical one. "Here the police officer did have reasonable and probable grounds for making a demand for a breath sample, there was no finding of bad faith on the part of police officer, and the accused consented to providing the blood sample," said Justice Roscoe. "The breach seems to have been founded in the officers mistaken belief in the time limit for obtaining a sample. These factors, taken together, tend to weigh in favour of admissibility of the evidence." The Nova Scotia Court of Appeal concluded the admission of the accused's blood analysis would not bring the administration of justice into disrepute and should have been admitted. The accused's appeal was dismissed and the matter was remitted back to provincial court for trial continuation with the blood analysis being admissible.

Complete case available at www.canlii.org

# ACADEMIC EXCERPT:

"Although the spouse beater may have no legitimate privacy claim in relation to the fact he beats his spouse, he can nonetheless shelter himself behind his general right to privacy in his home." - Croft Michaelson, "The Limits of Privacy: Some Reflections on Section 8 of the Charter" in jamie Cameron & James Stribopoulos, eds., The Charter and Criminal Justice : Twenty Five Years Later (Markham: LexisNexis Canada Inc., 2008) 87 at 102.

# BY THE BOOK:

## Blood Demand - Criminal Code


s.254(3) Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable

(a) such samples of the person's breath as in the opinion of a qualified technician, or

(b) where the peace officer has reasonable and probable grounds to believe that, by reason of any physical condition of the person,

(i) the person may be incapable of providing a sample of his breath, or

(ii) it would be impracticable to obtain a sample of his breath, such samples of the person's blood, under the conditions referred to in subsection (4), as in the opinion of the qualified medical practitioner or qualified technician taking the samples are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

s.254(4) Samples of blood may only be taken from a person pursuant to a demand made by a peace officer under subsection (3) if the samples are taken by or under the direction of a qualified medical practitioner and the qualified medical practitioner is satisfied that the taking of those samples would not endanger the life or health of the person.

# SEARCH INCIDENT TO ARREST DOES NOT REQUIRE WARRANT

## R. v. Nolet & Vatsis, 2009 SKCA 8

A Saskatchewan police officer randomly stopped a commercial transport tractor-trailer unit travelling eastbound along the Trans-Canada Highway near a weigh scale at 11:17 pm. The tractor-trailer unit had Quebec license plates and was being driven by the accused Vatsis while Nolet (a co-driver) and Blain (along for the ride but now deceased) were passengers at the time of the stop. The purpose of the stop was to conduct a safety check on the driver (sobriety and alertness) and the vehicle as well as inspect documents, including driver's license, registration, load papers, log books, and safety inspection stickers. On approach to the vehicle the officer noticed that the *IFTA* fuel tax sticker had expired, a provincial offence. Vatsis was asked for his driver's license, log book (which had not been filled out properly) and vehicle registration. When asked for a bill of lading and manifest for the load, Nolet advised they were travelling empty but provided bills of lading for the westbound portion of the trip showing deliveries which were not logged in the logbook. The vehicle was also not pro-rated for commercial driving in Saskatchewan, an offence without a permit. This would have entitled the officer to immediately prohibit the vehicle from further travel within the province.

The officer then inspected the trailer by looking through the open doors. Concerns arose that there may have been some alterations to the trailer. It "looked odd; it didn't appear right," he would later testify. The officer inspected the contents of the tractor portion of the unit and any documents (to see if there were multiple log books - in particular older ones) and to ensure that there was no cargo in the tractor area. The officer noticed some travel bags among some clothes on the floor and he pressed on a small duffel bag. He heard the sound of crackling paper and felt what he thought was paper in the bag. He opened the duffel bag expecting to find documents but instead discovered a bag full of money (later determined to be $115,000). He immediately arrested all three occupants for possessing proceeds of crime and gave them the police warning and advised them of their right to counsel. Back-up was called and a closer inspection of the trailer confirmed that modifications had been done to the trailer - the interior length of the trailer was about a metre less than the exterior length suggesting a false compartment at the front of the trailer. The vehicle was moved to the police detachment and 15 boxes and two duffel bags containing 392 pounds of marijuana were discovered after panelling was removed to expose the hidden compartment. Also found in and around the cab of the tractor unit were various papers, receipts, and commercial documents, including a complete change of decals and stickers, receipts and tolls, log books for other drivers, and a dispatcher report. The accuseds were charged with trafficking in marihuana, possessing for the purposes of trafficking, and possessing the proceeds of crime.

At trial in the Saskatchewan Court of Queen's Bench the trial judge found the initial vehicle stop and inspection was valid for regulatory purposes, but when the officer looked inside the trailer and formed the suspicion or "hunch" that alterations had been made, the focus or "predominant purpose" of his inquiry shifted from a regulatory inspection to a criminal investigation thereby engaging *Charter* protections. The powers of regulatory inspection under the *Motor Carrier Act* and the *Highways and Transportation Act,1997* permit examination, inspection, and searches of vehicles for violations related to commercial transport - a highly regulated industry. The initial detention in stopping the vehicle for regulatory reasons and the initial inspection of the empty trailer did not breach the *Charter*, but the two warrantless searches that followed - the search of the duffel bag containing the money and the post-arrest search in measuring the trailer at the roadside - were unreasonable because the officer did not have reasonable grounds.

As for the arrest it was unlawful. Although the discovery of the money in the duffel bag heightened the officer's suspicion, it did not establish reasonable grounds for arrest, thus violating s.9 of the *Charter*. The trial judge ruled the unusual circumstances of three drivers, a vehicle not registered for commercial use in Saskatchewan, and an empty load, were more "neutral" than indicative of illegal activity. And even if the arrest was lawful she would have held the two searches of the trailer subsequent to the arrest - the roadside measurement and the detachment search - breached the accuseds privacy rights.

The roadside search required a warrant as no exigent circumstances or safety concerns existed and the detachment search occurred two hours after the arrest and there were no exigent circumstances - the accuseds were in custody and the vehicle was secured with a padlock. Finding police breached s.8 (unreasonable search and seizure) and s.9 (arbitrary detention) of the *Charter,* the $115,000 in cash packaged in distinctive bundles and 392 pounds of marihuana were excluded as evidence by the trial judge. The trial judge was of the opinion that the admission of it would bring the administration of justice into disrepute and the accuseds were acquitted of all charges.

> "An individual who accuses the State of invasion of privacy bears the onus of proving that a reasonable expectation of privacy exists. The Crown, in the circumstances of a warrantless search, bears the onus of proving the search was reasonable, except where the search is incidental to a lawful arrest. Search incidental to arrest is an exception to the rule, and the individual therefore bears the burden of establishing the search incident to arrest was unreasonable.."

The Crown appealed to the Saskatchewan Court of Appeal arguing the trial judge erred in ruling the accuseds *Charter* rights had been violated. Under s.8, the Crown submitted that the accuseds failed to demonstrate they had any expectation of privacy with respect to the duffle bag or the commercial vehicle, and therefore had no standing to bring a s.8 *Charter* application. As well, it was contended that "dual purpose" searches do not violate s.8 of the *Charter* so long as the regulatory search was itself reasonable and met *Charter* scrutiny. In other words, a lawful search conducted within the scope of statutory or regulatory powers does not become invalid simply because the officer formed a suspicion of criminal wrongdoing. And the Crown submitted, among other things, that the trial judge did not consider the officer's suspicion about the false compartment in her assessment of whether there were reasonable grounds for arrest in the s.9 analysis.

## Privacy Expectation

Justice Wilkinson, writing the opinion for the majority, first noted that a person challenging a search must prove they had a reasonable expectation of privacy in the circumstances. This a precondition before there is an assessment of whether the search was unreasonable. She described it this way:

> An individual who accuses the State of invasion of privacy bears the onus of proving that a reasonable expectation of privacy exists. The Crown, in the circumstances of a warrantless search, bears the onus of proving the search was reasonable, except where the search is incidental to a lawful arrest. Search incidental to arrest is an exception to the rule, and the individual therefore bears the burden of establishing the search incident to arrest was unreasonable. [para. 37]

In meeting the onus, the person must do more than simply assert that a privacy interest exists. There is no automatic right to standing and a reasonable privacy interest must be established in the circumstances. "The curtain of privacy may be as solid as a screen or as sheer as a veil," said Justice Wilkinson. And simply

resting a privacy claim on presumptive possession and control of the vehicle is not necessarily enough. In other words, to gain access to the exclusionary remedy in s.24(2) an accused must show a breach of his or her personal rights. To succeed here the accuseds had to establish a sufficient privacy interest in the commercial vehicle or the duffel bag itself. Justice Wilkinson, however, found they failed. Although they were present for the search other factors did not support a privacy interest:

"Searches are only reasonable if they are authorized by law, if the law itself is reasonable, and if the manner of the search is reasonable."

- the log books that may have demonstrated historical possession or control were not completed;
- the vehicle did not usually operate outside Thunder Bay, Ontario;
- the accuseds' status and the nature of their relationship to the registered owner of the vehicle and/or the commercial carrier, was in a confused state and no attempt was made to clarify it.
- knowledge of the transportation legislation is a requirement to be licensed as a driver. The accuseds, as licensed drivers, would be well aware of the possibility of mandatory inspections and searches, whether for documents or for potential violation of any one of the countless obligations imposed by the regulatory scheme;
- no one asserted a right or interest in the duffle bag. The accuseds actively disclaimed any interest in the article of luggage and attributed sole ownership to Blain (the deceased passenger);

As a result, the accuseds did not meet the onus of establishing a privacy interest and therefore failed to establish a s.8 *Charter* infringement.

## Dual Purpose Search

The Crown's alternative dual purpose argument was also successful. The trial judge's analysis turned on whether the predominant purpose of the search related to a regulatory inspection or a criminal investigation. In other words, at the moment the officer saw the empty trailer and speculated that alterations had been made, the search was not transformed from a regulatory inspection into a criminal investigation. Instead, if the police have statutory powers of search, as in the *Highways and Transportation Act*, the fact that the police have suspicions of other kinds of wrongdoing apart from traffic offences did not invalidate the search. Dual purpose searches are not a violation of s. 8 of the *Charter*, so long as the statutory search meets *Charter* scrutiny.

"Searches are only reasonable if they are *authorized by law*, if the law itself is *reasonable*, and if the *manner* of the search is reasonable," noted Justice Wilkinson. And this was not a random check stop program where police powers have been constitutionally confined to matters of sobriety, licenses, ownership, insurance and mechanical fitness of cars and in going beyond these matters there must be reasonable grounds to detain according to the common law investigative detention requirements:

> Transposing principles from one context to another can present difficulties. The police powers during a random stop that constitutes an arbitrary detention under s. 9 of the Charter are not the same as police powers in a justifiable detention targeted to a regulatory scheme, nor are they the same as powers exercisable in the course of other police duties. The importance of the contextual approach lies in its consideration of the particular circumstances of *these* individuals, and *this* state action, adjudged in the totality of circumstances that have bearing on the case.

> Here, there was no arbitrary detention in relation to the regulatory stop. ... [A] lawful detention to investigate provincial infractions (a burnt-out headlight and open beer) does not become an unlawful detention, or prevent the police from asking questions about alcohol and mechanical fitness of the vehicle because the police also suspected the presence of drugs. ... [references omitted, para. 81-82]

However care must be taken in differentiating between powers exercisable in the course of a random roadside check stop, and those exercisable in the course of other police duties - such as when a driver is legally stopped for speeding. Officers do not need to ignore other legitimate aspects of their general duties and powers and when so engaged do not leave their perceptory senses - whether visual, olfactory or auditory - at some other location. However, in dual purpose stops, a nominally lawful aim should not be used as a *plausible facade* for an unlawful aim. In other words, the lawful aim cannot be used as a pretext, ruse, or subterfuge - a *plausible facade* - to perpetuate the unlawful aim. "It is not a question of degree, or determining which purpose is predominate or subordinate," said the majority. "Rather, it is a question whether a lawful purpose is being exploited to achieve an impermissible aim."

Here the police were exercising their powers in a manner consistent with statutory purposes and objectives, and within the scope of the legislative authority. A commercial carrier engaged in long-haul trucking operates in a tightly regulated environment and is subject to many recording and reporting requirements, especially when operating extra-provincially or internationally. Peace officers are inspectors for the purpose of monitoring compliance with various aspects of transportation policy, legislation and regulation. Their powers of search, and of entry and inspection have common themes:

> The scenario of an unregistered vehicle operating outside its usual jurisdiction with expired IFTA decals, attended by two, and possibly three, drivers carrying questionable documentation, certainly posed something of a regulatory nightmare. It would have been a rank abdication of duty on the officer's part had he not conducted further investigation. Having found no less than three regulatory violations in a scant few minutes, the officer had reasonable grounds to search for, and seize, documents and any evidence of other operating infractions. The violations were not trivial ones, and non-registration in Saskatchewan was a particularly glaring omission. The purpose of vehicle registration and the importance of strict compliance with the law is that registration is the first essential step towards the enforcement of all laws controlling the operation of motor vehicles on the public highways.

Weights and dimensions, and equipment that deviates from manufacturer's specifications, are entirely legitimate concerns of the regulatory scheme. This is an industry where even modest alterations to factory specifications must be flagged and safety inspected. It is an industry where ratings and over-dimensions, cargo securement, and weight distribution relate very directly to the stability of a tractor-trailer unit, and hence, valid safety issues. Trailers are prone to jack-knifing. Semi-trailers are generally the largest objects on the highway and the least maneuverable in terms of rapid response to changing road conditions. Instability can easily topple a trailer unit on a curve or an incline. A mere hunch or speculation that a trailer has been altered or refabricated, even if hidden contraband is the suspected reason for the alteration, does not taint an otherwise lawful regulatory search.

The search for documents was authorized by law. The officer testified that he relied on s. 63 of the *Highways and Transportation Act, 1997* that in his experience papers relevant to the commercial operation could be scattered in

> various areas throughout the tractor unit and, indeed, this proved to be the case. Nothing in the circumstances of this case indicated the officer's search for documents was a pretext or an exploitative misuse of the regulatory search powers, and the trial judge certainly did not find that to be the case. She did find that, on balance, he was "more interested" in drugs than documents, but did not conclude the regulatory concerns were being used as a pretext or a facade in order to facilitate a search for drugs.
>
> The fact that the officer abandoned the regulatory concerns once he found the cash does not negate the fact of their existence. [reference omitted, paras. 112-115]

And further:

> In summary, the search of the duffle bag fell within the scope of the officer's powers conferred explicitly by provincial statute (namely *The Highways and Transportation Act, 1997*) for securing and advancing the purposes and objectives of the Act in the context of the larger regulatory scheme. That power was not exploited, or used as a pretext, ruse or subterfuge. The Crown met the onus of establishing in the totality of circumstances that the search was: (a) authorized by law; (b) the law was reasonable; and (c) the manner of the search was reasonable. [It was not] an organized police initiative conceived and designed for the dual purpose of conducting sweeping criminal investigations during routine traffic stops. The operation overstepped the bounds of what was constitutionally permissible and could not be saved by s. 1 of the Charter. The operation could safely be characterized as a pretext. In contrast, the power to "look in every nook and cranny of a commercial vehicle" (absent pretext, ruse or subterfuge) can be likened to a statutory power of investigative detention for regulatory purposes. The ambit and scope of a regulatory inspection of a commercial vehicle far exceeds the limited inquiry permitted in a routine traffic stop of private vehicles. The powers in s. 63 of the *Highways and Transportation Act* to stop, search, and seize necessarily include the power to detain individuals for investigation of regulatory infractions the particular justification in this case being the log book violations. The officer was entitled to detain the [accuseds] until his investigation of the log books and supporting documents was complete. In my analysis, the issue of arbitrary detention does not come into play in the circumstances of the case until the point of arrest. [para. 121]

## The Arrest

Although the trial judge accepted that the officer subjectively believed he had reasonable grounds to arrest the accused for possession of proceeds of crime, she found that the circumstances - the empty load, the admittedly "rare" situation of a commercial vehicle operating without appropriate registration, the presence of a third occupant along for the ride - were more "neutral" than indicative of criminal activity and therefore, even in light of the $115,000 cash packaged in bundles, did not meet the objective test for arrest. However, she did not consider the other unusual circumstances, including the expired IFTA decals, the deficient log books, and the officer's sense that the cargo hold appeared odd or altered. In Justice Wilkinson's view the trial judge imposed too high a standard on the requirements for a lawful arrest.

In this case there was a large sum of money packaged in distinctive bundles, which, in the officer's experience, was indicative of drug proceeds. And the money was found, not in a private vehicle, but in a commercial vehicle attended by a number of unusual circumstances that were discovered very rapidly in the course of a regulatory inspection. The altered appearance of the cargo hold, while insufficient on its own to provide reasonable grounds, was nonetheless a relevant factor which, on the totality of the evidence, provided reasonable grounds for arrest. In

recognizing the requirement that an arresting officer's grounds be assessed against a reasonableness standard in order to protect against arbitrary, capricious, or officious abuse of state powers, Justice Wilkinson stated:

> To the extent that an "after-the-fact" judicial review must be able to independently and objectively assess the grounds upon which the officer relied, that standard is satisfied here. On preliminary inspection, the cargo hold looked odd or altered. Physical measurements could readily confirm the interior was significantly shorter than the exterior, and that the trailer's factory specifications had been altered. The officer's observation is objectively verifiable. ...
>
> However, if an officer forms a belief based, in part, on deviations in the appearance of an article, or a piece of equipment that is something that the reasonable person placed in the position of the officer might readily accept. Reasonable people understand it is possible to walk into a place and feel it looks smaller inside than it appears from the outside. These observations can be empirically tested.
>
> The trial judge took the view that if the measurement had been done earlier, it might have been relevant to the analysis. In deciding what cluster of circumstances, or "constellation of objectively discernable facts" is sufficient to provide reasonable grounds for arrest, the "reasonable person placed in the position of the police officer" would fairly and appropriately consider the circumstances in broad totality. With each "red flag" that this officer encountered, he did not have the luxury of stopping to take a thread count. He was one officer dealing with three individuals on a busy highway in the middle of a winter night. ... [I]n determining whether the reasonableness standard had been met, [a court can take into] account ... the context and the dynamics at play in situations of arrest where decisions must be made quickly and on information that is often less than exact or complete.
>
> Accordingly, the officer's suspicion concerning the appearance of the cargo hold should have been taken into account along with his experience in the field and the constellation of unusual factors or "red flags" that featured in the circumstances of this case. These included the discovery of a duffel bag full of money, a commercial vehicle operating far outside its usual corridor of operation without the appropriate registration or IFTA decals, the driver's explanation that a delivery had been recently made in yet another jurisdiction the vehicle was not authorized to operate in, the irregular documentation, and the unusual presence of three occupants in a vehicle carrying no commercial cargo. Further, the trial judge should have considered the officer's evidence regarding the unusual bundling of the money. [references omitted, paras. 131-134]

"In deciding what cluster of circumstances, or 'constellation of objectively discernable facts' is sufficient to provide reasonable grounds for arrest, the 'reasonable person placed in the position of the police officer' would fairly and appropriately consider the circumstances in broad totality."

The trial judge aslo erred in not considering the officer's experience and training in relation to seizures of cash and the significance of its distinctive packaging when considering whether objectively reasonable grounds for arrest existed because the officer had not been qualified as an expert. "The officer stated he had had past experience with seizures of cash, and his testimony regarding the small denominations and distinct bundling of the

cash should have been admitted and considered by the trial judge in relation to the question whether of the officer's belief that a crime had probably been committed was objectively reasonable," said Justice Wilkinson. "While the officer's lack of expertise may have precluded him from giving opinion evidence on the ultimate issue whether the money was, in fact, proceeds of crime, the evidence was nonetheless admissible for the limited purpose of explaining and justifying the officer's decision to effect an arrest." As a result, the trial judge erred in finding the arrest for possessing proceeds of crime unlawful and a breach of s.9 *Charter*.

## Searches Incident to Arrest

A search incidental to arrest, a common law power permitting police to search a lawfully arrested person and seize anything in his or her possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the prisoner's escape or provide evidence against him, is an exception to the principle that warrantless searches are *prima facie* unreasonable. The validity of such a search, however, "depends on the arrest being lawful, the manner of search being reasonable, and the purpose of the search being truly incidental to the arrest."

"The validity of [a search incident to lawful arrest] depends on the arrest being lawful, the manner of search being reasonable, and the purpose of the search being truly incidental to the arrest."

In this case the majority found both searches could be properly classified as searches incident to arrest. The first search - the roadside measurements of the interior and exterior of the trailer - bolstered the arresting officer's concern that there was a secret compartment in the cargo hold. The trial judge, however, said that even if the arrest was lawful, this search was not a reasonable search incident to arrest, because: (1) there were no exigent circumstances; and (2) there were no concerns for officer safety. She failed to mention the valid objective of searching for evidence. The second search - conducted a considerable time later at the detachment - was done for a valid purpose which was objectively reasonable. This purpose was to search for evidence related to the offence for which the accuseds had been arrested. The trial judge had applied an incorrect legal test in determining the validity of a search incident to arrest because she gave no consideration to whether the officer was lawfully engaged in a search for evidence related to the offence of possessing proceeds of crime.

The cash and marihuana should not have been excluded and the Crown's appeal was allowed, the acquittals set aside, and a new trial was ordered on all charges.

## A Different View

Justice Jackson, in dissent, was of a different opinion. In her view, the trial judge did not err in finding breaches of ss.8 and 9 of the *Charter*. She also agreed the money found in the duffle bag should have been excluded, but not the marihuana. The acquittal on the possessing proceeds of crime was sustained but she would have ordered a new trial on the possession and trafficking of marihuana charges. On the dual purpose issue, she stated:

> ... [T]his notion of dual purpose appears to be settled in this jurisdiction. The combination of both a lawful and an unlawful aim produces an unlawful check stop. The police authority to stop in this case rests on s. 40(8) only. ... [T]he police officer, in effecting that stop, cannot have, as one of his overt purposes, a search for criminal activity. In this case, the police officer discovered what he believed to be an infraction of *The Highways and Transportation Act, 1997*, but the principle is the same. A police officer who started out with a lawful purpose in effecting the random stop is not permitted to change his focus, without even "reasonable grounds to suspect," ... that a crime has been committed,

> simply because a regulatory infraction is discovered. [references omitted, para. 192]

And further:

> It is not inappropriate for a police officer "to be aware" that any regulatory search may uncover contraband or to have expectations that a search lawfully conducted in relation to the regulatory search power may uncover drugs. Nor can a police officer turn away from plain view or plain smell discoveries. What a police officer cannot do, however, is search for contraband with that as the purpose or one of the defined purposes of the search, when the search authority extends to regulatory matters only. It will be for a trial judge to determine what the police officer believed, saw or smelled.
>
> The trial judge's finding of the police officer's intention in this case is crucial. She found this police officer's focus changed from inspection to a search for criminal activity. I interpret these words to mean that the police officer's interest in regulatory matters was now playing a minor role, if any. The police officer was now searching for evidence of criminal activity when his only authority was to search in relation to regulatory matters. As defence counsel aptly point out, the trial judge did not find that the officer could not have continued his regulatory inspection once he had suspicions of criminal wrongdoing, if the focus had been still to investigate regulatory issues. For instance, she did not address what the situation would have been if the officer had continued, in spite of his suspicions, to inspect the vehicle in relation to regulatory concerns by asking to see the co-driver's log book, or any other documentation of this nature, or even searched the cab of the truck. The police officer, by contrast, proceeded immediately from a cursory examination of the trailer to the sleeping area, where his search began with a search of the luggage.
>
> The trial judge correctly interpreted the law. She made a clear finding as to the police officer's intentions. She then reached the conclusion that, in the circumstances of this case, for the officer to proceed to search for drugs as the focus of his search, he needed either informed consent or reasonable and probable grounds to search. I see no basis to interfere with either her reasoning or her conclusion. [paras. 198-200]

On the search incident to arrest analysis, Justice Jackson would have agreed with the majority that "if the arrest had been lawful, the searches undertaken as incident to that arrest would have been lawful as well" and the police would not have been required to obtain a search warrant.

Complete case available at www.canlii.org

**Editor's Note:** Appeal of this case to the Supreme Court of Canada has been granted.

# BY THE BOOK:

## Fisheries Act - Seizure Authority


s.51 A fishery officer or fishery guardian may seize any fishing vessel, vehicle, fish or other thing that the officer or guardian believes on reasonable grounds was obtained by or used in the commission of an offence under this Act or will afford evidence of an offence under this Act, including any fish that the officer or guardian believes on reasonable grounds

(a) was caught, killed, processed, transported, purchased, sold or possessed in contravention of this Act or the regulations; or

(b) has been intermixed with fish referred to in paragraph (a).

# NO PRIVACY INTEREST ESTABLISHED: s.24(2) INAPPLICABLE

## R. v. King, 2009 PEICA 9

The accused was a licenced commercial lobster fisherman and also employed with Transport Canada as a Harbour Master/Wharfinger where he had responsibility for the supervision and management of the Transport Canada Marine Terminal, including its warehouse. Access to the terminal was controlled by two gates, which were often left to allow public access. However, when a ship was being off-loaded the gates would be closed for security purposes. Various signs, restricting access and allowing only authorized vehicles were posted.

Near the end of spring lobster season two fisheries officers patrolling the area saw the accused's boat tied to the wharf with lobster traps and gear on board. The door to the warehouse at the Marine Terminal was open and the officers went inside to see if the accused was there. A number of fish pans full of rope were seen lying on the floor as well as some buoys. An officer heard a "cracking" sound - moving lobsters - and examined the contents of the lobster pans, finding a number of lobsters. He measured some of them and found some to be undersized. While one of the officers left the property in their vehicle, the other waited in an empty office for the lobster owner to return. About 90 minutes later the accused, in company of another person, returned, handled the lobsters, and proceeded to close the warehouse door. The officer confronted the men and told the accused some lobsters were undersized and he was violating the *Fisheries Act*. He was *Chartered*, declined to speak with a lawyer, and told the officers he owned the ropes and pans, but denied owning the lobsters (98 of 108 were undersized). The accused was charged under s.57(2) of the *Atlantic Fishery Regulations* and s.78(a) of the *Fisheries Act*.

At trial in Prince Edward Island Provincial Court the accused made a motion under the *Charter* to exclude any evidence related to the seizure. Although the trial judge found the officers had the right to enter the warehouse without a warrant to conduct an inspection, as soon as they discovered the illegal lobster they had embarked upon an investigation and were required to obtain a search warrant to validate their search and subsequent seizure. Because no warrant had been obtained, the accused's s.8 *Charter* right was breached and the lobsters were excluded under s.24(2). The charges were dismissed.

The Crown successfully appealed to the PEI Supreme Court. Since the officers lawfully entered the warehouse without a warrant to do an inspection, the appeal judge held anything discovered in the course of that inspection and reasonably believed to be obtained by the commission of an offence or which might assist in proving an offence could be seized by under s.51 of the *Fisheries Act*. The acquittal was set aside, and a new trial was ordered. The accused then appealed to the Prince Edward Island Court of Appeal.

> "Fundamental to obtaining relief under s. 24 of the Charter on the basis that there has been a breach of an individual's right to be protected from unreasonable search or seizure, is the presence of a personal privacy right. Absent a personal privacy right, an individual does not have any right to be protected from search and seizure."

Justice McQuaid, writing the opinion of the Prince Edward Island Court of Appeal, found it was unnecessary to determine whether the *Fisheries Act* powers of inspection rendered the entry into the warehouse and the lobster seizure reasonable. Instead, he focussed on whether the accused had a reasonable expectation of privacy in these circumstances. If there was no reasonable expectation of privacy then there was no *Charter* "search" and therefore no need to resort to s. 24(2). "Fundamental to obtaining relief under s.24 of the Charter on

the basis that there has been a breach of an individual's right to be protected from unreasonable search or seizure, is the presence of a personal privacy right," he said. "Absent a personal privacy right, an individual does not have any right to be protected from search and seizure."

"If there is no reasonable expectation of privacy on the part of an accused in respect to the place in which the search took place, there is no violation of the s. 8 right."

When an accused challenges the admissibility of evidence obtained from the search of a third party's premises, they bear the burden of first establishing, on the totality of the circumstances, that they personally have a reasonable expectation of privacy. "If there is no reasonable expectation of privacy on the part of an accused in respect to the place in which the search took place, there is no violation of the s. 8 right," said Justice McQuaid. "The totality of the circumstances must be considered in determining if there was such a reasonable expectation, and this includes the consideration of a number of factors."

Factors to consider in the overall analysis include (i) presence at the time of the search; (ii) possession or control of the property or place searched; (iii) ownership of the property or place; (iv) historical use of the property or item; (v) the ability to regulate access, including the right to admit or exclude others from the place; (vi) the existence of a subjective expectation of privacy; and (vii) the objective reasonableness of the expectation. Only after the accused establishes a reasonable expectation of privacy will the enquiry move to the second stage - whether the search was reasonable.

In this case, the Appeal Court found the accused did not have a reasonable expectation of privacy in the Marine Terminal:

> The [accused] was absent from the property at the time the officers arrived; however, they knew him to be present there at most times because of his position and they had observed his truck there earlier in the day. The [accused] was an employee of Transport Canada, the owner of the warehouse. He was responsible for the maintenance of the warehouse but did not have either possession or control by any legal interest such as a tenancy under a lease. He had possession only because of his position of employment and it was not exclusive. The property was accessible to the public with the [accused] having some control over which members of the public could enter and when they could enter. On the day in question, he was not enforcing this control as he left this public property fully accessible to all who wished to enter. Historically, the property was accessed by the public, albeit at times under the supervision of the [accused] as the wharfinger. I do not think the [accused] had any subjective expectation of privacy and this is borne out by the fact that he took the position, when questioned, that the lobsters were not his thereby inferring others had access for purposes of leaving their lobster on the property. While the [accused] strenuously asserts his personal privacy interest in the warehouse, on a close objective examination of all the circumstances, he did not have such an interest.
>
> There is the notion of territorial privacy used as " . . . an analytical tool to evaluate the reasonableness of a person's expectation of privacy." There is a range or hierarchy of places where our expectation of privacy has been found to be reasonable starting with our homes, the space around our homes, space where we might operate a commercial enterprise, our private cars and even a prison cell.
>
> The space occupied by the [accused] in the warehouse could not be said to be his commercial space because his employment with Transport Canada was separate and apart from his commercial fishing enterprise. He did not have control over the property as a fisher but as a wharfinger employed by Transport Canada. He was occupying a public building because of this employment and using it for his commercial fishing

> enterprise. He did not have any reasonable expectation of personal privacy in doing so. [references omitted, paras. 36-38]

And further:

> There is a much reduced expectation of personal privacy when inspection powers are exercised upon an individual participating in a highly regulated endeavor like the fishery. In a regulated environment, the individual's privacy interests must give way, more quickly than in criminal or quasi-criminal environment, to the need for broader powers of search and seizure. [para. 40]

Since the accused had no reasonable expectation of privacy in the Marine Terminal or the warehouse the officers did not breach s.8 of the *Charter* when they entered and seized the lobster pursuant to the *Fisheries Act*. And since there was no *Charter* violation, an analysis under s.24(2) of the *Charter* was not required. The accused's appeal was dismissed and a new trial was ordered.

Complete case available at www.canlii.org

# British Columbia Police and Peace Officers Memorial Service

**Sunday**
**September 27, 2009**

**Form up 11:40 am**
**March off 12:00 pm**

**Ceremony 1:00 pm**
**HMCS Discovery**
**Brockton Oval**
**Stanley Park**
**Vancouver,**
**British Columbia**

More info at

www.memorialribbon.com

# IN MEMORIAL

On May 5, 2009 41-year-old Royal Canadian Mounted Police Constable James Lundblad was killed in an automobile accident in Camrose, Alberta, while attempting to stop a speeding vehicle. He had been parked on the shoulder of the roadway when the speeder passed by.

As Constable Lundblad made a U-turn to stop the vehicle he was struck on the driver's side by a grain truck. Both vehicles were pushed into a ditch. Constable Lundblad suffered fatal injuries.

Constable Lundblad had served with the RCMP for eight years.

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


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