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IN SERVICE: 10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers in Canada.

IN MEMORIAL

On July 6, 2009 31-year old Ontario Provincial Police Probationary Constable Alan Hack was killed in an automobile accident in West Elgin, Ontario.

Constable Hack and his partner were pursuing a suspected car thief when their patrol car collided with an asphalt truck at 1:20 pm, causing both constables to be thrown from their cruiser. Constable Hack was transported to hospital where he died. His partner, who was driving, sustained serious, but non-life threatening injuries and survived.

Constable Hack had served with the Ontario Provincial Police for only six months and was assigned to the Dutton satellite of the Elgin detachment. He had previously served as a cadet with the agency for two years and as an auxiliary officer with the London Police Service for two years. Constable Hack is survived by his fiancée.

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

SUPREME WARNING

"We expect police to adhere to higher standards than alleged criminals." - Supreme Court of Canada *R. v. Harrison*, 2009 SCC 34 at para. 41.

Read about this case and many more Supreme Court judgments in this issue of "In Service: 10-8". Past issues available online at www.jibc.ca.

Highlights In This Issue

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

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

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

CF MILITARY POLICE CROSS COUNTRY RELAY

The CF Military Police are hosting a cross county motorcycle relay ride in support of two charities. On Sept. 2 Military and civilian police officers will finish the last leg of their first-ever Military Police National Motorcycle Relay Ride (MPNMRR) by riding from Victoria to 19 Wing Comox.

The MPNMRR began in St. John's NFLD on August 15 and will finish at Air Force Beach at 19 Wing Comox. The 7,392 km relay is a fundraiser for the Military Police Fund for Blind Children and the Support Our Troops Campaign. A stuffed Military Police Bear has been chosen to ride along for the entire journey and will also be used as the official baton.

The ride is open to all serving and retired military and civilian police, military and any other affiliates such as the Blue Knights, Corrections and Customs. The B.C. leg will begin in Jasper on Aug 30 and more riders are still needed. The cost to participate is $50, which goes directly to the two charities.

For more information on the relay or to register visit:
www.mpnmrr.ca

DR. KIM ROSSMO - current research & latest book

"Criminal Investigative Failures"

Free Training

Presented by **Simon Fraser University** - Police Studies Program
Friday October 16, 2009 from 12:45 pm to 2:20 pm @ SFU, Burnaby, B.C.
Registration for October 16th contact Ms. Dena Coburn at dcoburn@sfu.ca

Presented by **Justice Institute of British Columbia** - Police Academy Advanced Training
Monday October 19, 2009 from 10:30 am onwards @ JIBC, New Westminster, B.C.
Registration for October 19th contact Ms. Karen Albrecht at kalbrecht@jibc.ca

There is no cost for police personnel attending either of these presentations.

EVIDENCE ADMITTED DESPITE INTENTIONAL BREACH

R. v. Styles, 2009 ABCA 98

The accused was involved in a verbal argument with his brother about 4:30 pm which lead to an altercation. He produced and pointed a pen gun and made gestures to fire it. Fortunately, the gun did not work and the accused fled in a vehicle, pursued by his brother who called 911. Police located and arrested the accused in the area and he was advised of his *Charter* rights and was given a caution in an abbreviated form from the officer's memory. The accused said he wished to contact counsel and that he did not wish to say anything when told that he did not have to. He was then handcuffed and put into the back of a police car. The police surveyed the area because the accused asserted that he did not know where the gun was. There were two junior high schools and an elementary school nearby and officers searched for the pen gun for 15 minutes. A police tracking dog was called to the scene. When the arresting officer asked the accused where the pen gun was, he said it was well hidden but offered to tell them where it was if he would be let go. The officer replied that if the accused told him where the pen gun was he would have "a deal." The accused called the officer a liar, but the officer again asked where the gun was and said, "You have a deal." The accused escorted the officers to where the pen gun was located. It and a .22 calibre cartridge were located.

At trial in Alberta Provincial Court the Crown conceded that the accused's s.10(b) *Charter* rights were violated but did not seek admission of any statements made by the accused before he was given a reasonable opportunity to consult counsel. However, the Crown sought the admission of the pen gun as evidence. The accused testified that the police obtained the gun after having handcuffed him uncomfortably for an hour and after a somewhat rough arrest. It was only when the officer started talking about the safety of children that he broke down and revealed the gun's location. Although the trial judge did not find this situation to be one of "urgent and dangerous circumstances" nor a situation of lack of due diligence which might suspend the police duty to refrain from seeking self-incriminatory evidence from the accused, the trial judge concluded that, having regard to the anticipated presence of children in the area, it would have been bad practice not to do what the police did, i.e. to acquire the pen gun by questioning the accused. After finding that the police were acting in good faith, the trial judge admitted the pen gun into evidence under s.24(2). The accused was convicted of uttering threats, using a firearm while committing an offence, pointing a firearm, and having a weapon in his possession for a purpose dangerous to the public peace.

> "Although this was probably an intentional Charter breach to acquire the pen gun, the sincere and imminent public safety concerns held by the police help determine the magnitude of infringement," said the Appeal Court. "The urgency of a situation is ... not one readily amenable to 'a protracted pedagogical review'."

The accused appealed to the Alberta Court of Appeal arguing, in part, that the trial judge ought to have excluded the pen gun from evidence in light of the circumstances under which it was recovered. But, after assessing the trial judge's application of the s.24(2) analysis involving the factors of trial fairness, the seriousness of the violation, and the admission of the evidence on the repute of justice, the Appeal Court upheld the trial judge's ruling.

Trial Fairness

The pen gun itself was non-conscriptive evidence, but the manner in which the police located it involved conscriptive action thereby making it derivative evidence. The impact on trial fairness, however, could be largely reduced, if not eliminated, if the Crown could demonstrate, on a balance of probabilities, that the evidence would have been

obtained by alternative means, such as by an independent source or by inevitable discovery. In this case, the police had two strong motives to find the pen gun - the safety of children nearby and the forensic value of the evidence if promptly recovered. The area to search was not particularly large and a tracking dog had arrived. The victim saw where the accused ran and the police would have inevitably found the pen gun even though their efforts to find it so far had been unavailing.

Seriousness (Magnitude) of the Violation

The police acted in good faith and the priority given to finding the gun was reasonable. "Although this was probably an intentional Charter breach to acquire the pen gun, the sincere and imminent public safety concerns held by the police help determine the magnitude of infringement," said the Appeal Court. "The urgency of a situation is ... not one readily amenable to 'a protracted pedagogical review'." The Court continued:

> Moreover, magnitude of infringement is not defined simply by reference to the *Charter* sub-section in which it arises.
>
> What is said to be the "magnitude" here is not the fact of acquiring forensically significant self-incriminatory evidence but only a physical object. The Crown did not need - and the trial judge did not link - the evidence of the [accused's] statements, including the whereabouts of the gun, to identify the object as a gun as the physical object was shown to [the victim]. This is not a case of multiple *Charter* breaches or police misconduct directed towards the [accused]. [references omitted, paras. 15-16]

The circumstances of the accused's arrest and detention was unrelated to the breach. Although he asserted that being handcuffed in the car discomfited him, he said he told the police where the gun was because the police appealed to his conscience. The trial judge had also found the accused had suffered no significant prejudice by admitting the gun, perhaps because the accused's rights had not been seriously abused or because the forensic consequence of admission of the pen gun, having regard to the victim's evidence describing it, was of a reduced forensic impact.

Effect of Exclusion on Repute of Justice

In holding the pen gun admissible as evidence the Court concluded:

> In a case involving a missing firearm in an area where children play, the impression of a reasonable observer, aware of the facts and having thought the matter through, would hardly be irrelevant. Even in the United States, with its robust exclusionary rule focussed on deterrence of police misconduct, it is recognized that indiscriminate application of the exclusionary rule may well "generate disrespect for the law and administration of justice". Misuse of firearms has become a plague in Alberta cities even more than in many other parts of Canada. The exclusion of this evidence would do more harm to the repute of justice than its admission. In the result, we do not find error by the trial judge in his conclusion under s.24(2) of the *Charter*. [references omitted, para. 18]

"Misuse of firearms has become a plague in Alberta cities even more than in many other parts of Canada. The exclusion of this evidence would do more harm to the repute of justice than its admission.."

And if the pen gun was excluded, there was other evidence which could support it being a firearm, such as spontaneous admissions made by the accused during the trial as well as testimony from the victim. So even if admission was an error, the trial judge's finding that the accused used a pen gun (firearm) did not occasion a substantial wrong or miscarriage of justice. Since the pen gun was properly admitted, the accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

DOCTRINE OF 'TRANSFERRED INTENT' DOES NOT APPLY TO ATTEMPT MURDER

R. v. Gordon, 2009 ONCA 170

The accused was involved in an altercation and retaliation incident with innocent victims following an abortive drug purchase outside a Cafe. The accused had offered to buy an ounce of marihuana for $90, but the prospective drug dealer was angered by the low ball offer and punched the accused and one of his friends. The accused and his friends scattered. A few minutes later the accused returned with a sawed off shotgun, firing three blasts in the direction of the drug dealer and others still standing in front of the Cafe. When the shooting began, the drug dealer ran into the bar, through the premises and out the back door without being struck by any of the pellets. Others, however, were not so fortunate.

Two women standing on the sidewalk outside talking when the shooting began were struck by several shotgun pellets. One was hit in the ear, head and face, chest and arm, and on her hand while the other was hit in the face and neck, chest and right shoulder, arm, hand and wrist. A man, standing and talking on his cell phone, was also struck. He lost the sight in one eye and most of his sight in the other eye. The accused was charged with three counts of attempted murder and three counts of aggravated assault respecting the victims struck by shotgun pellets and attempted murder, discharging a firearm with intent and pointing a firearm in relation to the drug dealer.

At trial in the Ontario Superior Court of Justice the Crown contended that the accused was guilty of attempted murder on the drug dealer because he had an intention to kill him, and on each of the other injured victims through the common law doctrine of "transferred intent." Because he intended to kill the drug dealer, the *mens rea* of attempted murder was transferred to the other victims and founded his liability. The accused, on the other hand, submitted there was no evidence he intended to kill any injured victim, either as an individual or a member of a group of persons standing outside the Cafe. In his view, the principles of transferred intent could not found liability for attempted murder. The trial judge concluded liability for attempted murder against the injured victims could be established through the application of transferred intent. The accused was convicted by a jury of all counts. After invoking the Kienapple principle, the trial judge entered conditional stays on all counts except the four counts of attempted murder and sentenced the accused to 10 years in prison.

> "The doctrine of transferred intent, sometimes described as transferred malice or transferred fault, applies when an injury intended for one falls on another by accident. When an accused, with the mens rea of a crime, does an act that causes the actus reus of the same crime, the doctrine holds that the accused commits the crime."

The accused then appealed to the Ontario Court of Appeal arguing the trial judge was wrong to instruct the jury that the doctrine of transferred intent was available to find liability for attempted murder on the injured victims. The unanimous Appeal Court agreed. Although a person who intends to kill another person, but by accident or mistake, kills someone else is guilty of murder, the person who intends to kill another, but by accident or mistake, hurts or injures someone else is not guilty of attempted murder. Justice Watt described the doctrine of transferred intent as follows:

> The doctrine of transferred intent, sometimes described as transferred malice or transferred fault, applies when an injury intended for one falls on another by accident. When an accused, with the mens rea of a crime, does an act that causes the actus reus of the same crime, the doctrine holds that the accused commits the crime. The doctrine applies only where the harm that follows is of the same legal kind as that intended. Said differently, malice is transferred only within the limits of the same crime. Any defence, justification or excuse available to an

> accused in relation to the intended victim is likewise transferred to the actual victim.
>
> The doctrine of transferred intent is said to be of general application (within the limits of the same crime), but it usually arises in the context of offences against the person, especially those offences that include consequences as part of their actus reus. [references omitted, paras. 42-43]

And further:

> The common law doctrine of transferred intent takes the mens rea of an offence in relation to an intended victim and transfers it to the actus reus of the same offence committed upon another victim. Considered separately, each prospective crime lacks an essential part. The mens rea (intended victim) lacks an actus reus. And the actus reus (actual victim) lacks mens rea. In combination, however, they amount to a whole crime through the application of a legal fiction. [para. 68]

But in deciding that the doctrine of transferred intent did not apply to attempted murder, Justice Watt wrote:

> In my view, a close examination of the principles that underlie the doctrine of transferred intent compels the conclusion that this common law doctrine does not apply to the inchoate crime of attempt, in particular to attempted murder, and thus cannot be part of our law through the operation of s. 8(2) of the Criminal Code [the criminal common law of England continues to apply in Canadian proceedings].
>
> .....
>
> First, every crime, inchoate or substantive, involves both mens rea and an actus reus. The actus reus of many but not all crimes may include an element of harm, as for example the crimes of unlawful homicide. In most cases, including offences against the person, the mens rea and actus reus relate to the same victim. When transferred intent principles are in play, however, the mens rea relates to an intended victim and the actus reus relates to the actual victim. The principles connect a culpable mental state in relation to one with a result or harm visited upon another.
>
> The principles underlying transferred intent apply to crimes that require a result as part of the actus reus, for example, death of a human being in cases of unlawful homicide. But inchoate crimes in general, and attempted murder in particular, do not require a result or harm as part of their actus reus. The actus reus is complete upon the first act beyond preparation.
>
> Second, no modern and reasoned authority is offered to support the claim that transferred intent principles apply to the crime of attempted murder.
>
> In this case, if the [accused] intended to kill [the drug dealer] and, by accident or mistake, killed one or more bystanders, the unlawful homicide would be murder under s. 229(b). But it by no means follows that the [accused's] crime is attempted murder where the bystanders were injured but not killed, although it would be murder if they died.
>
> Third, the application of transferred intent principles to the crime of attempted murder may extend liability unduly and foster irrational distinctions. X shoots at Y intending to kill him. In the vicinity of Y are several others. All hear the shot, but none are injured. How far do we extend the scope of liability on the basis of transferred intent?† If someone is injured, a bystander, is X guilty of attempted murder of that person on the basis of transferred intent? And, if so, are we making a distinction on the basis of a consequence that is immaterial to liability for attempted murder - injury or harm? Recourse to a legal fiction in these circumstances is scarcely necessary to fairly label and punish the crimes committed.

"In this case, if the [accused] intended to kill [the drug dealer] and, by accident or mistake, killed one or more bystanders, the unlawful homicide would be murder under s. 229(b). But it by no means follows that the [accused's] crime is attempted murder where the bystanders were injured but not killed, although it would be murder if they died."

> Fourth, in crimes of attempt, it is not necessary to make a whole crime out of two halves by joining the intent in relation to one victim with the harm caused to another, the purpose that underlies the principle. When the unintended victim suffers no harm, the accused has already committed an inchoate crime in relation to the intended victim, a crime of the same level of gravity as if the intent were to be transferred under the doctrine. Leaving aside principles of concurrent intent, the accused may also be punished in connection with the unintended victim according to his moral culpability and the injury he or she has caused.
>
> Finally, consummated criminal homicides are, in the last analysis, sui generis. Many of their complexities, of which the transferred intent doctrine (or its statutory surrogate) is one, simply do not travel well to other climes, especially those where harm is not a constituent of the actus reus. Moreover, no necessity exists forcing the transferred intent doctrine to march into territory other than that of actual, consummated criminal homicides. For the remainder, the actuality of the real mens rea, together with its precisely related actus reus, is enough to establish guilt at the appropriate level without any need to resort to an intention - shifting legal fiction. [references omitted, paras. 69-77]

As a result, the Ontario Court of Appeal found the trial judge erred in law instructing the jury on the application of transferred intent to charges of attempted murder on the three injured bystanders. The convictions of attempted murder for each of the three injured victims were set aside and convictions of aggravated assault were entered.

Complete case available at www.ontariocourts.on.ca

Editor's note: An appeal of this case to the Supreme Court of Canada was dismissed.

Note-able Quote

"Personal responsibility is a difficult thing to ask for in a nation which has attempted to find a societal 'root cause" for all things." ~

Shapley R. Hunter

SEARCH INCIDENTAL TO ARREST REQUIRES PROPER PURPOSE

R. v. Majedi, 2009 BCCA 276

The police stopped the accused after a computer check indicated she was breaching her recognizance by being in the area. She told officers the provision was no longer in effect but did not have her court papers with her. A call to her "lawyer" confirmed this, but the officers weren't sure the person they spoke to was a lawyer. A police dispatcher confirmed the provision remained in force and the accused was arrested, handcuffed and secured in a police vehicle.

The officers decided to impound the accused's vehicle because it was illegally parked. A search turned up a woman's handbag and a backpack. One officer searched the handbag, testifying he did so to look for court papers and to inventory possible valuables. He found some money. The other officer searched the backpack to inventory it and protect police from potential liability if valuables went missing, and to search for sharp objects to protect custodial staff. Drug paraphernalia and cash were found in the backpack and the accused was re-arrested for drug trafficking. Further searches of the car yielded more evidence to support the drug charge, but it was subsequently determined that the recognizance condition was no longer valid.

At trial in British Columbia Provincial Court, the accused challenged her arrest and the admissibility of the evidence the officers found. She submitted her rights under s.8 of the *Charter* had been breached and that the evidence should have been excluded under s.24(2), but the trial judge rejected her arguments. He found the arrest was valid and the searches that followed were lawful as an incident to the arrest. The searches were not simply for one purpose - to inventory the purse contents, he ruled. One purpose was to inventory valuables but the officers were also concerned about safety - there may have been a sharp item (needle or knife) or other weapon. The second purse was also searched to find court documents, which may have assisted the accused. Even if the searches breached her rights, the

judge would have admitted the evidence under s.24(2).

The accused appealed to the British Columbia Court of Appeal, contending the searches were for inventory only, not a valid criminal justice purpose, and therefore did not fall within the scope of a proper search incident to arrest. Thus, the searches were unreasonable under s.8 and the evidence should have been excluded under s.24(2), she submitted. The Crown countered that the searches were valid as an incident to arrest and, even if they were not, an inventory search was permissible when the vehicle was impounded.

Although warrantless searches are presumptively unreasonable, a search incident to arrest can justify them. Justice Chiasson, writing the unanimous opinion, examined the power to search as an incident to arrest, noting a number of propositions:

- Officers undertaking a search incidental to arrest do not require reasonable and probable grounds; a lawful arrest provides that foundation and the right to search derives from it;
- The right to search does not arise out of a reduced expectation of privacy of the arrested person, but flows out of the need for authorities to gain control of the situation and to obtain information;
- A legally unauthorized search to make an inventory is not a valid search incidental to arrest;
- The three main purposes of a search incidental to arrest are: one, to ensure the safety of police and the public; two, to protect evidence; three, to discover evidence;
- The categories of legitimate purposes are not closed: while the police have considerable leeway, a valid purpose is required that must be "truly incidental" to the arrest;
- If the justification for the search is to find evidence, there must be a reasonable prospect the evidence will relate to the offence for which the person has been arrested;
- Police undertaking a search incidental to arrest subjectively must have a valid purpose in mind, the reasonableness of which must be considered objectively.

In this case, Justice Chiasson found there was no issue of officer safety apparent to justify entering the car; the accused was handcuffed and in a police vehicle. However, because the vehicle was to be impounded as an incidence of the arrest, the officer was entitled to enter it to determine whether there were dangerous items or weapons inside.

The search of the purses, however, had nothing to do with the crime for which the accused was arrested - breach of recognizance. "The facts needed to charge her for that crime were known: she was identified as a person in a place she wasn't supposed to be," said Justice Chiasson. The officer testified he was looking for exculpatory papers, a valid purpose that was connected to the arrest. The accused stated the papers were not there and the trial judge was entitled to accept the officer's stated purpose as an additional factor relevant to the validity of the search.

Furthermore, both officers said they searched the purses, which would accompany the arrestee to the police station, for the safety of the jail staff. The officers reasonably believed the purses would likely accompany the accused to the jail, a belief that was objectively reasonable. On this point, Justice Chiasson stated:

> The officers relied on their experience that personal effects such as purses usually accompany arrested persons to jail. They also relied on their experience and jail staff practise that requires an inventory of the contents of personal effects that are held by the police for safe keeping. In my view, the officers believed the purses would accompany [the accused] to the police station and would be searched there by jail staff. The subjective and objective requirements for searching the purses for objects that might imperil the safety of jail staff were met. [para. 32]

The court did caution that "the law is very clear that the police cannot simply rummage through the personal effects of arrested persons in the absence of a proper criminal justice purpose."

Since the searches in this case were justified as an incident to arrest, it was unnecessary to determine whether they would have been valid solely for inventory purposes. The accused's appeal was dismissed.

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

FAKE GUM TEST NOT A CHARTER BREACH

R. v. Delaa, 2009 ABCA 179

The accused was a strong suspect in two violent sexual assaults. An undercover operation was launched to obtain his DNA by collecting cast off evidence. He was selling his truck so undercover officers posed as potential purchasers. During a test drive, an officer and the accused stopped at a gas station to check the vehicle's fluids. Another officer approached and asked if they would like to participate in a gum survey. Prior to the gum testing, the undercover taste tester offered the accused a lollipop which had been in her mouth. The accused placed it in his mouth, then returned it to her. The accused agreed to participate and sampled four pieces of gum, spitting them into a Dixie cup provided by the undercover gum tester, ostensibly to avoid littering. DNA obtained from the gum and lollipop matched that of the sexual assault suspect. The accused was arrested and a warrant for his blood samples was obtained. Lab testing confirmed the sample was a match.

At trial in the Alberta Court of Queen's Bench the judge concluded police did not breach the accused's *Charter* rights during the undercover operation. He did not have a reasonable expectation of privacy since he voluntarily participated in the gum survey, which occurred in a public place. He wasn't in police custody or control and discarded the gum as garbage.

Even if there was a *Charter* breach, the judge would not have excluded the evidence under s.24(2). The DNA evidence was non-conscriptive and discoverable in any event. The accused was not compelled, threatened or coerced to produce the evidence but participated willingly. Police acted in good faith, there was no interference with bodily integrity and the samples were willingly discarded or abandoned.

Furthermore, the accused wasn't physically detained in any way, police dealt with him in an undercover capacity in a public place and he had no reasonable expectation of privacy in the samples. As well, the trick was passive and not unfair or dirty. It would not shock the community and police ultimately obtained a sample of the accused's DNA through a warrant. Any breach would not have been serious, the accused wasn't vulnerable and the operation was carried out in a respectful manner under circumstances of some urgency and necessity. The charges were serious, the DNA evidence crucial to the Crown's case and excluding it would bring the administration of justice into disrepute. The accused was convicted of two sexual assaults.

The accused appealed to the Alberta Court of Appeal, arguing the trial judge erred in finding that there was no s.8 *Charter* violation when police seized his DNA. An illegal search occurred, he submitted, when the officer asked him to spit his chewing gum into the cup. In the accused's view, he did have a reasonable expectation of privacy in the seized gum because he did not abandon it - the undercover officer collected it. And if his rights were breached, the accused also asserted the trial judge erred in his s.24(2) analysis.

> "Abandonment is a conclusion inferred from the conduct of the person claiming the s.8 right, thus consideration of reasonableness (of a claimed expectation of privacy) must relate to the conduct of that person and not to anything done or not done by the police or anyone else involved in the subsequent collection and treatment of the items discarded."

When a person abandons property, they no longer have a reasonable expectation of privacy in it. In this case, the accused conceded that if he had merely dropped the gum onto the ground or put it in a garbage can, there would have been no violation of s.8. However, he submitted that the officer holding out the cup - suggesting where it should be put when he was finished with it - was state intervention or compulsion and therefore not abandonment. The appeal court disagreed.

"Abandonment is a conclusion inferred from the conduct of the person claiming the s.8 right, thus consideration of reasonableness (of a

claimed expectation of privacy) must relate to the conduct of that person and not to anything done or not done by the police or anyone else involved in the subsequent collection and treatment of the items discarded," noted the court. "Thus, the focus must be on the conduct of the (accused) and whether a reasonable and objective person, considering the totality of the circumstances, would think spitting out the gum into the cup was abandonment."

Spitting out the gum in this case was abandonment, and it didn't matter whether the accused spit it into an anonymous object like a garbage can, the ground, an ashtray or in a receptacle someone placed in front of him - the cup. "It is the act of spitting it out that evidenced what can only be seen as an unequivocal intention to dispose of it," the Court said. "He was clearly finished with it and had no intention of preserving it."

As for the argument that the accused was compelled by state intervention to abandon the gum, the Court stated:

> The act of the officer holding out the Dixie cup did not cause the (accused) to discard the gum; it merely provided an opportunity for the police to collect it. The actions of the (accused) were voluntary. He was free to choose to participate in the gum survey, free to choose whether to discard the gum and where to dispose of it. He wasn't compelled to put his gum into the cup, although it was suggested that he do so. (The accused) voluntarily discarded the gum as garbage, in a public setting and not in custody. The (accused) abandoned his privacy interest. [para. 20]

Finally, the police technique of providing the cup wasn't intrusive nor objectively unreasonable. The undercover operation was merely a "passive trick" and could not be seen as a "dirty" one or as something that would "shock the community". There was no s.8 violation and therefore no need to consider s.24(2).

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

CONDOMINIUM MANAGEMENT NOT ACTING AS STATE AGENTS

R. v. Drakes & Brewster, 2009 ONCA 560

The two accused were involved in a sophisticated large scale fraud scheme concerning the advance payment of fees in order to secure the release of huge multi-million dollar sums from the Central Bank of Nigeria. The fees were collected from the victims who received nothing in return. The scheme was operated out of a "boiler room" in a condominium unit. While the investigation was ongoing there was a flood in the unit. As a result, maintenance staff made observations in the course of responding to the flood and it was clear that the occupants of the unit were using it as an office from which financial transactions were being conducted. The maintenance staff communicated this information to the condominium management, who called the police. The police took statements from the maintenance staff and obtained a warrant to search the condominium, recovering thousands of documents, at least ten telephones, and several fax machines which deeply implicated the accuseds in the fraud scheme. They were charged with several counts of fraud over $5,000, attempted fraud, and laundering the proceeds of crime.

At trial in the Ontario Superior Court of Justice the judge ruled that the search of the condominium was reasonable and did not violate s.8 of the *Charter*. She concluded, among other findings, that s.8 of the *Charter* was not engaged when the police obtained information from the building staff about the contents of the condominium when they responded to the flood. In her view, condominium and management staff had an obligation to respond to the flood and their entry had nothing to do with police intervention. "It follows that the way in which the police had access to the information about certain items inside the unit was as a result of a normal response to the flood," said the trial judge. "Management then contacted the police, not as agents but as citizens reporting suspicious activity." And even if the search was unreasonable, the evidence was admissible under s.24(2) of the *Charter*. Drakes was convicted of seven counts and sentenced

to five years imprisonment while Brewster was convicted of five counts and sentenced to four years imprisonment.

The accuseds appealed their convictions to the Ontario Court of Appeal arguing, in part, that the *Charter* was engaged when police "seized" information from the property managers. But the Court of Appeal disagreed. The building superintendents and/or the property managers who provided the information about the contents of the condominium to the police were not "agents" of the state. The superintendents merely responded to a flood and then reported suspicious activity in the unit to the property managers who in turn furnished it to the police. Their conduct did not engage s.8 of the *Charter* because there was no state action:

> We note that before the building superintendents entered the condominium unit in response to the flood, they did not know that the police were conducting an investigation or had any interest in unit 216. They received no special instructions from building management with respect to their inspection of the unit, nor were they directed to deal with the police. As a result, they did not enter the unit or conduct their inspection any differently than they otherwise would have because of any police intervention. Similarly, when the property managers and staff re-entered unit 216 two days later, they did so for the purpose of checking the residue of the flood damage and, as one of the managers put it, "out of curiosity". Again, there is no evidence that they entered and inspected the unit at the behest of or for the benefit of the police or in response to a police request or demand. In these circumstances, the trial judge was correct to conclude that the defence claims of state action had not been made out.
>
> We also observe that ... in the absence of any agency issue, police can receive and act on information received from a third party and use the information to seek the issuance of a search warrant; this is precisely what happened in this case. [paras. 15-16]

Since there was no s.8 breach, s.24(2) of the *Charter* did not apply. The accuseds' appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

BREACHES OF UNDERTAKINGS ARISING FROM SAME ACT NOT BARRED BY KIENAPPLE

R. v. Poker, 2009 NLCA 33

The accused was released on an "Undertaking to a Peace Officer" with a condition that he "abstain from communication with Evelyn Lidd". About a month later he was again released on another "Undertaking to a Peace Officer" with another condition to "abstain from communication with Evelyn Lidd". A couple of months after that he was seen in the company of Ms. Lidd, thereby breaching the two undertakings. Two days later he pointed a loaded shotgun at several persons and was charged with a number of counts arising from that incident.

At trial in Newfoundland Provincial Court on several charges, including the two breach of undertakings relating to Ms. Lidd, the accused was convicted of breaching only one of the undertakings related to her. The trial judge stayed one count of breach of undertaking ruling, in part, that "no one should be punished twice for the same offence" when "the charges arise out of the same incident, where the same facts from the same legal point of view are the foundation of both charges, and whether there is in fact a single wrong."

The Crown then appealed the stay of proceedings on the basis that the trial judge erred in his application of the principle against multiple convictions (known as the Kienapple principle). Justice Rowe, writing the judgment for the Newfoundland Court of Appeal, agreed with the Crown. He found the trial judge mixed the principle against multiple convictions with whether the Crown should have chosen to proceed on two counts of breaching the undertaking. On the latter point Justice Rowe stated:

> I note this as it is important to bear in mind that whether the Crown chooses to proceed with a charge is a matter within the Crown's discretion and is not a matter for judicial supervision. The judicial function relates to the disposition of

> charges, rather than to the decision to proceed with them. [para. 16]

As for the disposition issue, the Newfoundland Court of Appeal found that breaches of two undertakings arising from the same act did not offend the rule against multiple convictions. In coming to its conclusion the court relied on two earlier cases. In *R. v. Furlong* the same court held that a conviction for breach of a recognizance and breach of probation (both arising from the same act) did not offend the rule against multiple convictions. And in *R. v. F. (C.G.)* the Nova Scotia Court of Appeal upheld convictions for two breach of undertakings. The Court in that case stated:

> … [A]n offence of this nature [breach of undertaking] is "… designed to protect the effective operation of the criminal justice system." … The gravamen of the offence is failure to abide by the undertaking to the Court. Where, as here, there are two undertakings, given on different days to obtain release with respect to different sets of offences charged in different Informations, convictions for breach of both of these entirely separate undertakings do not offend the principle that a person ought not to be punished twice for the same wrong. Two promises were made to the court to secure release from custody on two separate sets of charges. Two promises were broken by the same failure of good behaviour. [para. 50]

The Crown's appeal was allowed, the stay of proceedings was set aside and a conviction was entered for the second count of breach of undertaking.

Complete case available at www.canlii.org

"[W]hether the Crown chooses to proceed with a charge is a matter within the Crown's discretion and is not a matter for judicial supervision. The judicial function relates to the disposition of charges, rather than to the decision to proceed with them."

LEARNING LEGAL LINGO:
Kineapple Principle

"[F]or the Kienapple rule to apply: there must be both a factual and legal nexus between the several charges. Multiple convictions are only precluded under the Kienapple principle if they arise from the same "cause", "matter", or "delict", and if there is sufficient proximity between the offences charged. This requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element contained in the offence for which a conviction is sought to be precluded by the Kienapple principle." —
R. v. Prince, [1986] 2 S.C.R. 480

s.10(b) IMPOSES DUTIES ON BOTH THE POLICE & THE DETAINEE
R. v. Brown, 2009 NBCA 27

After stopping the accused to check driver's documents, a police officer noted a smell of alcohol. The officer asked the accused to provide a sample of his breath in an approved screening device and as a result, along with his observations, provided the officer with grounds to believe the accused had been driving while impaired. The officer demanded the accused accompany him to the police station to provide a breath sample. The officer informed the accused that he had the right to retain and instruct counsel without delay and that he had the right to contact "a lawyer of [his] own choice" or that he could obtain free and immediate advice form a Legal Aid lawyer who was available at all times. The accused said he understood the information and, upon a further inquiry as to whether he wanted to exercise his right to counsel, he answered "I don't know right now," instead asking to call his parents.

At the police station, the accused was given the opportunity to contact his parents by telephone, speaking to his mother for approximately 20 minutes.

Once that call was completed, the officer again asked if the accused wanted to speak to a lawyer. He answered in the affirmative but did not specify a particular lawyer. The officer called the on-call duty counsel, gave the accused the telephone and left the room. The accused spoke to duty counsel, told the officer he was ready to provide a breath sample, and subsequently provided two breath samples; 110 mg% and 100mg%.

At trial in New Brunswick Provincial Court the accused claimed that when he spoke to his mother he learned of the family lawyer's name, but felt rushed and intimidated by the officer. He did not tell the officer of the family lawyer's name nor ask to speak to a particular lawyer. And even after speaking to duty counsel he did not mention his family lawyer's name nor ask to speak to a lawyer of his choosing. He nonetheless claimed there had been a violation of his s.10(b) right to counsel and that the certificate of analysis should have been excluded under s.24(2).

The trial judge found the police had violated s.10(b) because the officer did not inquire whether the accused wanted to speak to counsel of his choice thereby breaching the requirement that the police officer act diligently in facilitating the right of the accused to consult counsel of choice. The officer was not "reasonably diligent" since he assumed from the accused's answer that he had no specific counsel in mind or simply forgot to ask him. Despite finding a breach, the trial judge found it was a minor one and the evidence of the certificate was admitted under s.24(2). The accused was convicted of over 80mg%.

The accused's appeal to the New Brunswick Court of Queen's Bench was unsuccessful. The appeal judge concluded that there was no s.10(b) breach at all. In her view, it was the accused who had not been reasonably diligent in exercising his right to counsel because of his failure to assert a desire to speak to private counsel. The appeal was dismissed.

The accused then appealed to the New Brunswick Court of Appeal arguing the appeal judge erred in holding there was no breach of his s.10(b) right to counsel and that the evidence should have been excluded. Justice Richard, writing the judgment of the Court of Appeal first noted that s.10(b) of the *Charter* imposes on the police both informational and implementation duties. In this case, the officer complied with the informational duty. Therefore, the question was whether the officer complied with the implementational duty.

The implementational component of s.10(b) imposes duties on both the police and the detainee. The first two duties imposed on the police arise when the detainee indicates a desire to contact counsel. The police must provide the detainee with a reasonable opportunity to contact counsel (except in urgent and dangerous circumstances) and refrain from eliciting evidence from the detainee until the reasonable opportunity has been provided. The next duty is on the detainee to be reasonably diligent in exercising their right. If the detainee is not reasonably diligent then the duty to refrain from eliciting evidence will be suspended.

However, Justice Richard found "it is not realistic, in every case, to so neatly compartmentalize the obligations that arise out of the implementation component of the s. 10(b) right" by drawing a clear mark of delineation between the concepts of "reasonable opportunity" and "reasonable diligence" if all of the circumstances are not considered in making the determinations. He continued:

> This is so because the main governing principle, in determining questions of "reasonable opportunity" and "due diligence", is the need to examine the totality of the circumstances. Thus, any analysis that requires a determination of "reasonable opportunity" without regard to all the circumstances is not the proper approach to the s. 10(b) analysis. The trier of fact must look at the facts globally and determine whether in "all of the circumstances" it can be said that the detainee was not provided with a reasonable opportunity to exercise the right to counsel. These circumstances include not only the behaviour of the police, but also that of the detainee. What might be reasonable in some cases might not be in others.
>
> A key fact in the determination of what is reasonable in the circumstances is the state of knowledge of the police. A course of action that might be reasonable in some circumstances

might be unreasonable if undertaken with knowledge of certain facts. For example, providing a telephone book to assist a detainee in locating a particular lawyer, in some cases, may be most relevant to the determination of "reasonable opportunity", but providing a telephone book, without more, to a detainee the police know to be illiterate would not be of much benefit. Where officers know or should know certain facts, the reasonable course of action may be dictated by the state of their knowledge. However, where the officers are not aware of certain facts that are within the exclusive knowledge of the detainee, and where the detainee does nothing to make the officers aware, a different course of action may be indicated. In such a case, regard to "all the circumstances" would include whether one would reasonably expect the detainee to inform the police of certain facts. This would depend on factors such as any circumstances that might impede or prevent the detainee from making the facts known to the police, including the overall atmosphere in which the events occurred. [paras. 23-24]

"A course of action that might be reasonable in some circumstances might be unreasonable if undertaken with knowledge of certain facts. For example, providing a telephone book to assist a detainee in locating a particular lawyer, in some cases, may be most relevant to the determination of 'reasonable opportunity', but providing a telephone book, without more, to a detainee the police know to be illiterate would not be of much benefit."

Here, the trial judge failed to consider all of the circumstances when considering whether the accused was reasonably expected to inform the police that he wished to contact a particular lawyer and whether this counted in determining what was a reasonable opportunity for him to exercise his right to counsel. The officer advised the accused of his right to consult with counsel of choice or with Legal Aid duty counsel and he indicated he understood these rights. When the accused asked to speak to his parents, the officer facilitated the call. When he asked to speak to counsel, without specifying a particular lawyer, again, the police officer facilitated the call. Once he had spoken to duty counsel, the accused agreed to supply the samples of his breath. The police officers did nothing to impede or prevent the accused from exercising his rights and there was nothing to suggest the officers knew or should have known that he wanted to call a particular lawyer.

"Where officers know or should know certain facts, the reasonable course of action may be dictated by the state of their knowledge. However, where the officers are not aware of certain facts that are within the exclusive knowledge of the detainee, and where the detainee does nothing to make the officers aware, a different course of action may be indicated."

Looking at all the circumstances, the accused was afforded a reasonable opportunity to exercise his right. "If he wanted to call a particular lawyer, something which only he knew at the time, all he had to do was say so, either once he finished speaking with his mother or even once he had spoken to duty counsel," said Justice Richard. "In the prevailing atmosphere of cooperation, one would reasonably have expected him to have informed the officer of his choice. [The accused's] failure to convey this information to the officer is a relevant factor in the determination of whether or not the police provided him with a reasonable opportunity to exercise his right to counsel." The opportunity afforded the accused to exercise his right to counsel was a reasonable one and, if he did not consult counsel of his choice, it was because he was not reasonably diligent in the exercise of his right.

The police did not breach the accused's right to counsel and his appeal was dismissed.

Complete case available at www.canlii.org

FAILURE TO RE-ADVISE RIGHT TO COUNSEL AT POLICE STATION NOT NECESSARILY A BREACH
R. v. Devries, 2009 ONCA 477

A police officer saw the accused driving somewhat erratically and pulled her over. He immediately noticed several indicia of impairment, arrested the accused, and advised her of her rights under s.10(b) of the *Charter*. He then asked her if she wished to contact a lawyer "now". The accused said she did not want to call a lawyer and a secondary caution advising her of the charge and affording her the opportunity to make a statement was given. A breath demand was made and the accused was transported to the police detachment, arriving about 20 minutes after she was advised of her rights. She was not given any further advice about her right to counsel and two breathalyzer tests produced readings of 160mg%. The accused was charged with impaired driving and over 80mg%.

At trial in the Ontario Court of Justice the accused argued that she was not given her right to counsel as required by s.10(b) of the *Charter* and that the evidence of the breathalyzer results should be excluded under s.24(2). The trial judge rejected this contention, finding that the officer had complied with s.10(b) because the accused had stated at the roadside that she did not wish to speak to a lawyer. The accused had made an informed decision not to consult with counsel and the officer had no additional obligation to further advise her of her right to counsel once they arrived at the police station. The accused was convicted of both charges, but the impaired driving conviction was stayed.

An appeal by the accused to the Ontario Superior Court of Justice was successful. The appeal judge concluded that the officer was required to advise the accused of all legal services or information available to her at the police station and to expressly tell her that contact with counsel would be made at the police station and not at the roadside. "The informational component of section 10(b) was not met in the case at bar," said the judge. "The [accused] was also asked if she wanted to speak to counsel on a non-existing phone at the roadside. The [accused] should have been told in no uncertain terms at the roadside that upon arrival at the police station a phone and a list of callers would have been made available to her if she so chose. This was not done and the police breached her s.10(b) rights to call counsel before taking the breath test." A new trial was ordered.

The Crown then successfully appealed to the Ontario Court of Appeal, despite the accused's submission that she should have been told that she would be allowed to contact counsel at the detachment should she choose to exercise her right to counsel. Justice Doherty, delivering the unanimous judgment, ruled that the police officer was not obliged to tell the accused at the roadside that consultation with a lawyer would take place at the police station. In describing the right that arises from s.10(b) of the *Charter*, Justice Doherty stated:

> "Section 10(b) contains two distinct rights. First, it obligates the police to inform a detainee of his or her right to speak with a lawyer without delay. Second, it guarantees the right of a detainee to retain and instruct counsel. If a detainee chooses to exercise that right, the police must provide the detainee with a reasonable opportunity to do so and must refrain from further questioning the detainee or otherwise eliciting evidence from the detainee until he or she has had a reasonable opportunity to consult with counsel."

Section 10(b) contains two distinct rights. First, it obligates the police to inform a detainee of his or her right to speak with a lawyer without delay. Second, it guarantees the right of a detainee to retain and instruct counsel. If a detainee chooses to exercise that right, the police must provide the detainee with a reasonable opportunity to do so and

must refrain from further questioning the detainee or otherwise eliciting evidence from the detainee until he or she has had a reasonable opportunity to consult with counsel. ... [T]he informational component of s. 10(b) ... places the burden on the police to inform the detainee of the right to counsel guaranteed to the detainee by s. 10(b).

"[T]he informational component of s.10(b) ... places the burden on the police to inform the detainee of the right to counsel guaranteed to the detainee by s.10(b)."

The informational component of s. 10(b) has two parts. The first is apparent in the language of the section, while the second is a product of the jurisprudence. Section 10(b) expressly requires that the detainee be told of his or her right to retain and instruct counsel without delay. ... [T]he informational component of s. 10(b) [has been extended] to include the requirement that the detainee must be informed of the existence and availability of duty counsel and Legal Aid. ... [The police are required] to inform detainees about the availability of counsel through Legal Aid, and the availability of immediate free legal advice to everyone through duty counsel services assuming those services exist in the jurisdiction. ...

The requirement that all detainees must be told of the existence and means of accessing duty counsel and Legal Aid gives the constitutional right to counsel found in s. 10(b) real meaning. The right would be hollow for those unaware of how they might obtain immediate legal assistance if they were given no information by the authorities as to how to access legal assistance. Nor, given the dynamics at play in a detention situation, should the onus be on the detainee to make inquiries as to how he or she might exercise the constitutional right to counsel. [The right sto be told of duty counsel and legal aid] ensure that all detainees have sufficient information to make an informed decision as to whether to speak with counsel before submitting to police interrogation or testing. [references omitted, paras. 21-23]

In this case the officer complied with the informational components of s.10(b). She was told she could retain and instruct counsel without delay, could telephone any lawyer she wanted to call, had the right to access immediate free legal advice via the toll-free number given to her, and if charged with an offence, she could apply through the Legal Aid Plan for legal assistance in defending against the charge. In holding that compliance with s.10(b) does not necessarily require the officer to inform the detainee that contact will occur when the detainee is taken to the police station, Justice Doherty stated:

> ... I do not think that the use of the word "now" in the context of the administration of the s. 10(b) caution at the roadside implies that the detainee can speak with a lawyer instantly upon the officer's completion of the s. 10(b) caution. Most police officers are not standing with a telephone in their outstretched hand as they complete the s. 10(b) caution. The officer's statement to a detainee at the roadside that he or she may speak with a lawyer "now" would necessarily convey that the right to speak with a lawyer was contingent on the availability of a telephone that was useable in circumstances that would permit the detainee to speak with a lawyer for the purpose of obtaining legal advice.

"Most police officers are not standing with a telephone in their outstretched hand as they complete the s. 10(b) caution. The officer's statement to a detainee at the roadside that he or she may speak with a lawyer 'now' would necessarily convey that the right to speak with a lawyer was contingent on the availability of a telephone that was useable in circumstances that would permit the detainee to speak with a lawyer for the purpose of obtaining legal advice."

It is important to distinguish between the nature of the rights guaranteed by s. 10(b) and the further question of whether the police have properly complied with a detainee's right to consult with counsel in any given case. The constitutional right

is the right to speak with a lawyer "without delay". All detainees are entitled to that right and must be so advised by the police. The language used by the police cannot suggest that the right to speak with a lawyer only arises at some point later on in the detention. If the detainee, having been told he or she has a right to speak with a lawyer "without delay", chooses to exercise that right, the police must then afford him or her a reasonable opportunity to do so. Whether the steps taken by the police to make a telephone available to a detainee, in circumstances where he or she can speak with counsel, comply with the implementational requirements of s. 10(b) turns on the facts of the specific case and not on whether the police properly informed the detainee of his or her right to speak with counsel without delay.

In cases involving a roadside detention and a breathalyzer demand, all detainees must be told that they have the right to speak with a lawyer "without delay". They must also be told that they can access immediate free legal advice using the toll-free number. Should a detainee choose to speak with counsel "without delay", the police must afford him or her the opportunity to do so. Depending on the circumstances, consultation with counsel "without delay" may require a telephone call at the roadside, at the police station where the breathalyzer test will be administered, or perhaps in very unusual cases, somewhere else. It will all depend on the facts of the particular case. Questions of where and when consultation with counsel will occur are properly considered as part of the implementational phase of the rights guaranteed by s. 10(b).

There are insurmountable practical problems associated with incorporating into the s. 10(b) caution the requirement that the officer tell the detained person where the communication with counsel will occur should the detained person choose to speak with counsel. Police officers, when advising a detained person of his or her right to counsel under s. 10(b), will often not know all of the facts that may be relevant to where and when access to counsel must be provided to comply with the implementational component of s. 10(b) should the detainee elect to consult with counsel. For example, the arresting officer may believe that the consultation with counsel must occur at the police station because the arresting officer does not know that the detainee has a cell phone that works in the location where the arrest occurs. In that case, an indication to the detainee that any contact with counsel must be made at the station might well misinform the detainee as to the nature of his or her s. 10(b) rights should the detainee elect to contact counsel. It may be that the implementational requirements of s. 10(b) would require that the detainee be allowed to make the call from the roadside.

> The practical difficulties that would be created by requiring arresting officers to tell detainees where and when they can exercise their s. 10(b) rights as part of the informational component of s. 10(b) is not limited to the roadside arrest/breathalyzer demand situation. In most arrest situations, the arresting officer will not be in a position to hand the detained person a telephone immediately upon completing the s. 10(b) caution. In these situations, there will inevitably be some time gap in time and place between the detained person's assertion of his or her wish to speak with counsel and the availability of the means of effecting that communication with counsel. ... [paras. 30-34]

And further, on the wording used by police to convey the informational component:

> It is fruitless to search for phrasing that does not have any potential to mislead anybody in any given situation. Rather than pursuing the hopeless task of finding absolutely unambiguous language, compliance with s. 10(b) must be measured by its ability to convey the essential character of the s. 10(b) rights to the detainee – the right to immediate access to a lawyer, including access through the toll-free number to immediate free legal advice.
>
> There is value in the use of a standardized s. 10(b) caution which complies with the informational requirements established in the Supreme Court of Canada jurisprudence. Attempts to graft onto the standardized caution fact-specific information as to where and when the detainee can exercise the right to counsel, if he or she chooses to do so, is more calculated to create litigation than to advance the purposes of the constitutional right protected by s. 10(b).

> I ... do not suggest that the police are never obligated to go beyond the information required to comply with the informational component of s. 10(b). Questions or comments made by a detainee or other circumstances at the time the s.10(b) caution is given may indicate a misunderstanding by the detainee of the nature of the s. 10(b) rights. In those circumstances, the arresting officer will have to provide a further explanation of the rights ... [paras. 36-38]

"Where a detainee has been properly cautioned at the roadside and has indicated that he or she does not wish to speak with a lawyer, failure to re-advise the detainee of his or her right to counsel at the police station does not necessarily constitute a breach of s. 10(b)."

In this case, the accused did not suggest that she did not understand what she was told about the right to counsel or that she was misled into believing that her only choice was to contact counsel from the back of the police cruiser at the roadside. She was invited to consult with counsel "now" and unequivocally declined that opportunity. "[T]here is nothing inherently misleading in telling a detainee at the roadside that he or she can speak with a lawyer 'now'," said Justice Doherty. "[T]hat phraseology conveys the immediacy of the detainee's entitlement to speak with a lawyer. The further question of what the police must do to make good on that offer arises if and when the detainee chooses to exercise the right to speak with a lawyer 'without delay'." He continued:

> The language used by [the officer] conveyed to the [accused] that she could speak with a lawyer without delay if she wanted to do so. Combined with the information he gave her concerning how she could access counsel immediately through the toll-free number, the [accused] was armed with all the information she needed to make an informed decision as to whether she wanted to speak with a lawyer before submitting to the breathalyzer demand.
>
> I would add one further comment with respect to [the officer'] failure to re-advise the [accused] of her right to counsel when [they] arrived at the detachment. ... Where a detainee has been properly cautioned at the roadside and has indicated that he or she does not wish to speak with a lawyer, failure to re-advise the detainee of his or her right to counsel at the police station does not necessarily constitute a breach of s. 10(b). That said, however, I think that in cases such as this, it would be a much better practice for the police, upon arrival at the detachment, to reiterate the right to counsel. A simple repetition of the right to counsel and an invitation to a detainee to speak with counsel "now", if he or she wishes to do so, would serve two purposes. First, it would reinforce the fundamental importance of the right to counsel and the need for all participants in the justice system to recognize that fundamental importance. Second, it would effectively short-circuit any claim at trial by a detainee that he or she was misled at the roadside by the use of the universal s. 10(b) caution into believing that the right to counsel could only be exercised then and there. Given the right circumstances, and absent a reiteration of the right to counsel at the police station, that argument could succeed. [paras. 41-42]

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

Complete case available at www.ontariocourts.on.ca

Legally Speaking:

Voluntary Statement

"It is trite law that a statement by an accused person to a person in authority must be shown to have been voluntary in the legal sense before it can be received in evidence. This is so whether the statement is to be tendered by the Crown as part of its case or is to be put to the accused person in cross-examination should he testify." - British Columbia Court of Appeal Justice Low in *R. v. D.W.N.* , 2009 BCCA 317 at para. 6.

GROUNDS OBJECTIVELY JUSTIFIED: NO ss.8 or 9 BREACHES MADE OUT

R. v. Murtezovski, 2009 ONCA 423

The police intercepted a package addressed to "K. Woodhouse" that contained three bricks of cocaine. The cocaine was removed and replaced with three similar-looking bricks containing flour and 20 grams of cocaine in the wrapping of one of the bricks. They then arranged for a "controlled delivery" to K. Woodhouse's address by an officer disguised as a UPS worker. While surveilling the residence police observed K. Woodhouse and another person leave separately in two of three vehicles parked at the residence shortly before the delivery. The accused's father's car was the only car that remained outside.

After delivering the package, the accused took it and signed his own name. Ten minutes later the police saw the accused leave the residence in his car with a gym bag. He was stopped" and arrested for possessing cocaine for the purpose of trafficking. When the police entered the vehicle they found the gym bag with three plastic bags containing the "cocaine" bricks still sealed and unopened. The accused also had a marijuana joint and twenty grams of hashish. He was charged with conspiracy to possess cocaine for the purpose of trafficking, possession of cocaine for the purpose of trafficking, and possession of marijuana and cannabis resin for the purpose of trafficking.

During a pre-trial motion the Ontario Superior Court of Justice dismissed the accused's arguments that his ss. 8 and 9 *Charter* rights were breached. The conspiracy charge was dismissed but the accused was convicted of possessing cocaine for the purpose of trafficking and simple possession of marijuana and simple possession of cannabis resin as an included offence in the count of possessing for the purpose of trafficking.

The accused then appealed to the Ontario Court of Appeal arguing the police did not have reasonable grounds to arrest him. His submission, however, was rejected. The Court stated:

> It was not contested that the officer who decided the [accused] should be arrested subjectively believed he had reasonable grounds to arrest him. The circumstances viewed in combination also met the objective standard required. The [accused], who was the only person apparently in the house at the time of the delivery, after physically receiving the package, left shortly thereafter with a bag capable of carrying what had been delivered. [para. 9]

The accused's *Charter* rights were not breached and, even if they were, the evidence would not be excluded.

Complete case available at www.ontariocourts.on.ca

PRIMA FACIE CASE FOR BREATH DEMAND NOT NEEDED: RPG SUFFICIENT

R. v. Shepherd, 2009 SCC 35

A police officer saw the accused's vehicle fail to stop at a stop sign and then begin to travel at 20 to 25 km/h over the posted speed limit. The officer activated his police car's siren and lights to pull the vehicle over. The vehicle slowed down but did not stop. It then accelerated and changed lanes multiple times over approximately a three km distance before finally pulling over. The officer approached the vehicle and informed the accused that he was under arrest for failing to stop for the police. The accused explained that he had not stopped because he thought the police car was an ambulance. The officer noted the accused looked lethargic, fatigued and had red eyes. He could smell alcohol on his breath and also noted that his movements and speech were slow and deliberate. The officer formed the opinion that the accused was "intoxicated", read the *Charter* warning, and made a breathalyzer demand. The accused provided samples of his breath and was charged with impaired driving, over 80mg%, and fail to stop for police.

At trial in Saskatchewan Provincial Court the accused was acquitted of all charges. Although the officer subjectively believed that the accused's ability to drive was impaired by alcohol, his belief was not objectively reasonable given the accused's

explanation that he thought the police car was an ambulance. In the trial judge's view, this explanation was just as valid to explain the erratic driving as the suggestion that he was impaired by alcohol. Since the officer did not have the necessary grounds to demand a breath sample, the accused's s.8 *Charter* rights were breached and the evidence of the breath results were excluded under s.24(2). Furthermore, the accused's explanation also provided a reasonable doubt as to whether he had the intention to evade police when he failed to stop.

A Crown appeal on the impaired driving and over 80mg% charges to the Saskatchewan Court of Queen's Bench was unsuccessful. The appeal judge held there was ample evidence to support the finding that the officer did not have objective grounds to make the demand. The Crown's appeal was dismissed.

A further appeal by Crown to the Saskatchewan Court of Appeal was successful. A majority of the Court of Appeal found the officer had reasonable and probable grounds to believe that the accused's ability to operate a motor vehicle was impaired by alcohol. In the majority's view, the trial judge failed to give sufficient consideration to the officer's opinion that the accused was intoxicated, while at the same time gave too much weight to the accused's evidence that he thought the police car was an ambulance. A new trial was ordered.

The accused then appealed to the Supreme Court of Canada arguing the officer lacked the requisite grounds to make a breathalyzer demand thereby breaching his *Charter* rights. But an unanimous court dismissed the appeal and confirmed the order of a new trial. "Section 254(3) of the Criminal Code ... requires that an officer have reasonable grounds to believe that the suspect has committed an offence under s. 253 of the Code (impaired driving or over 80) before making a breathalyzer demand," said the Court. "The requirement in s. 254(3) that reasonable and probable grounds exist is not only a statutory but a constitutional requirement as a precondition to a lawful search and seizure under s. 8 of the Canadian Charter of Rights and Freedoms." On the issue of reasonable grounds and the resultant breath demand and testing, the Court stated:

> ... where evidence is obtained as a result of a warrantless search or seizure, the onus is on the Crown to show that the search or seizure was reasonable. A search will be reasonable if it is authorized by law, the law itself is reasonable, and the manner in which the search was carried out is reasonable. No issue is taken with the manner in which the search was carried out or the reasonableness of the breath demand provisions in the Code. Rather, the only question is whether the arresting officer complied with the statutory pre-conditions for a valid breath demand.
>
> ... s. 254(3) of the Criminal Code requires that the officer have reasonable grounds to believe that within the preceding three hours, the accused has committed, or is committing, an offence under s. 253 of the Criminal Code. The onus is on the Crown to prove that the officer had reasonable and probable grounds to make the demand because the Crown seeks to rely on breath samples obtained as a result of a warrantless search. It would also be impractical to place the burden on the accused because evidence of the presence or absence of reasonable and probable grounds is within the "peculiar knowledge" of the Crown.
>
> ... there is both a subjective and an objective component to establishing reasonable and probable grounds; that is, the officer must have an honest belief that the suspect

"The onus is on the Crown to prove that the officer had reasonable and probable grounds to make the demand because the Crown seeks to rely on breath samples obtained as a result of a warrantless search."

"[T]here is both a subjective and an objective component to establishing reasonable and probable grounds; that is, the officer must have an honest belief that the suspect committed an offence under s. 253 of the Criminal Code, and there must be reasonable grounds for this belief."

> committed an offence under s. 253 of the Criminal Code, and there must be reasonable grounds for this belief. ... [references omitted, paras. 15-17]

In this case there was no dispute about whether the officer had the necessary subjective belief; the issue was whether the subjective belief was objectively reasonable in the circumstances. In finding the trial judge erred and the indicia of impairment did amount at law to reasonable and probable grounds to make the breath demand, the Court held:

> With respect, it is our view that the trial judge erred in finding that the officer's subjective belief of impairment was not objectively supported on the facts. The officer's belief was based not only on the accused's erratic driving pattern but also on the various indicia of impairment which he observed after he arrested [the accused]. The trial judge placed substantial weight on [the accused's] explanation that he thought the police vehicle was an ambulance. Leaving aside the fact that this confusion itself can be a sign of impairment, it is important to note that the officer need not have anything more than reasonable and probable grounds to believe that the driver committed the offence of impaired driving or driving "over 80" before making the demand. He need not demonstrate a prima facie case for conviction before pursuing his investigation. In our view, there was ample evidence to support the officer's subjective belief that [the accused] had committed an offence under s. 253 of the Criminal Code. We therefore conclude that the officer had reasonable and probable grounds to make the breath demand... [para. 23]

Since there was ample evidence to objectively support the officer's subjective belief that the accused's ability to drive was impaired by alcohol, the officer's breathalyzer demand was lawful, and the accused's *Charter* rights were not violated. Therefore, there was no reason to resort to s.24(2).

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

Note-able Quote

"If men were angels, no government would be necessary" ~ James Madison

DESPITE UNLAWFUL DETENTION, GUN ADMITTED

R. v. Grant, 2009 SCC 32

Three police officers were patrolling in the area of four schools with a history of student assaults, robberies and drug offences over the lunch hour. Two officers were in plainclothes driving an unmarked car. They were monitoring the area and maintaining a safe student environment. A third officer was in uniform, driving a marked car, and doing directed patrols in order to maintain a visible police presence, provide student reassurance and deter crime during the lunch hour period. The plainclothes officers asked the uniformed officer to stop the accused and chat with him after they saw him walk by in a "suspicious" manner. He had "stared" at the officers in an unusual manner and "fidgeted" with his pants and coat, which looked suspicious. The uniformed officer stood in the accused's path on the sidewalk, told him to keep his hands in front of him, and began to question him.

The two plainclothes officers arrived and stood behind the uniformed officer. The accused was initially only asked for identification, but then he was asked if he had ever been arrested and whether he had anything on him he shouldn't. Although initially saying "no," he did say he had a small amount of marihuana and, when asked if there was anything else, admitted to having a loaded revolver. The accused was arrested, his revolver seized from his waist pouch, and he was charged with five firearms offences.

At trial in the Ontario Court of Justice the accused's motion to exclude the gun from evidence because his rights under ss. 8, 9 and 10(b) of the *Charter* had been violated was dismissed. The trial judge found there was no detention nor did the officer's inquiries amount to a search under s.8. He ruled that the conversation between the uniformed officer and the accused was merely "chit chat", while the officer's statement for the accused to keep his hands in front of him was a "request", not a "direction or demand." Finally, the accused could have simply walked around the officers and kept going. He was convicted

of the firearm offences and sentenced to 18 months imprisonment.

The accused's appeal to the Ontario Court of Appeal was dismissed. The Court of Appeal did rule there was a detention during the conversation prior to the accused's incriminating statements and that the detention was arbitrary because the officer had no reasonable grounds for the detention. The gun was characterized as derivative evidence from a s.9 *Charter* breach, but nonetheless admissible under s.24(2), so the convictions were upheld.

The accused then appealed to the Supreme Court of Canada continuing to argue that he was arbitrarily detained and should have been advised of his right to a lawyer before he was questioned and provided the inculpatory answers that led to the discovery of the firearm. And if he was not detained, he submitted that his rights under s.8 of the *Charter* were breached. As a consequence of the violations, he suggested the evidence should have been excluded under s.24(2).

The Crown, on the other hand, contended that the accused was not detained until he disclosed his firearm and the police arrested him, at which point they advised him of his right to talk to a lawyer. The Crown argued that the officers were engaged in a dynamic, community policing interaction and the preliminary, non-coercive questioning pursuant to police policy was a legitimate exercise of investigative police powers essential to the effective fulfilment of their duty to enforce the law, and did not amount to detention triggering the right to counsel.

What is a Detention?

All seven judges agreed that the accused had been detained, although there was division on how to determine whether a detention occurred. The majority (5 judges) interpreted a "detention" generously, yet purposively, and broadly recognized the purpose of s.9 is to "protect individual liberty from unjustified state interference". Section "9 guards not only against unjustified state intrusions upon physical liberty, but also against incursions on mental liberty by prohibiting the coercive pressures of detention and imprisonment from being applied to people without adequate justification," said the majority. "The detainee's interest in being able to make an informed choice whether to walk away or speak to the police is unaffected by the manner in which the detention is brought about." Furthermore, when someone is detained, s.10(b) is engaged. This relationship between detention and the right to counsel was described by the majority this way:

> "Detention" also identifies the point at which rights subsidiary to detention, such as the right to counsel, are triggered. These rights are engaged by the vulnerable position of the person who has been taken into the effective control of the state authorities. They are principally concerned with addressing the imbalance of power between the state and the person under its control. More specifically, they are designed to ensure that the person whose liberty has been curtailed retains an informed and effective choice whether to speak to state authorities, consistent with the overarching principle against self-incrimination. They also ensure that the person who is under the control of the state be afforded the opportunity to seek legal advice in order to assist in regaining his or her liberty. ...
>
> By setting limits on the power of the state and imposing obligations with regard to the detained person through the concept of detention, the Charter seeks to effect a balance between the interests of the detained individual and those of the state. The power of the state to curtail an individual's liberty by way of detention cannot be exercised arbitrarily and attracts a reciprocal obligation to accord the individual legal protection against the state's superior power. [para. 22-23]

The Court found that a detention occurs when a state agent suspends an individual's liberty interest by a significant physical or psychological restraint.

Psychological restraint occurs when:

1. a subject is legally required to comply with a direction or demand (eg. roadside breath sample demand); or
2. there is no legal obligation to comply with a restrictive or coercive demand, but a reasonable person in the subject's position would feel so obligated. This can be difficult to consistently define but the question to ask is "whether the police conduct would cause a reasonable person

to conclude that he or she was not free to go and had to comply with the police direction or demand." The test is objective, taking into account the entire circumstances of the situation, including the conduct of the police.

> "s.9 guards not only against unjustified state intrusions upon physical liberty, but also against incursions on mental liberty by prohibiting the coercive pressures of detention and imprisonment from being applied to people without adequate justification."

Objective Test

In determining whether a person is detained, the court will use an objective test based on the totality of the circumstances:

> The objective nature of this inquiry recognizes that the police must be able to know when a detention occurs, in order to allow them to fulfill their attendant obligations under the Charter and afford the individual its added protections. However, the subjective intentions of the police are not determinative. (Questions such as police "good faith" may become relevant when the test for exclusion of evidence under s. 24(2) is applied, in cases where a Charter breach is found.) While the test is objective, the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive. To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go. It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual's right to choose, and conduct that does not. [para. 32]

Aspects of an encounter a court should consider when determining whether a person was psychologically detained, in the absence of a legal obligation to comply, include the circumstances of the encounter, the nature of the police conduct (how they acted and what they said), and the characteristics of the individual:

- **circumstances of the encounter**
  - were the police making general inquiries, providing general assistance, or maintaining general order or did they have a focussed suspicion on a particular individual?
- **conduct of the police**
  - language used;
  - physical contact;
  - the place where the interaction occurred;
  - the presence of others;
  - length of the encounter. "Consider the act of a police officer placing his or her hand on an individual's arm," said the majority. "If sustained, it might well lead a reasonable person to conclude that his or her freedom to choose whether to cooperate or not has been removed. On the other hand, a fleeting touch may not, depending on the circumstances, give rise to a reasonable conclusion that one's liberty has been curtailed. At the same time, it must be remembered that situations can move quickly, and a single forceful act or word may be enough to cause a reasonable person to conclude that his or her right to choose how to respond has been removed."
- **characteristics of the individual**
  - age;
  - physical stature;
  - minority status;
  - level of sophistication.

Non-Detentions

It is clear at one end of the police/citizen encounter spectrum that a detention overlaps with arrest or imprisonment and that a legal obligation to comply with a police demand or direction, such as a breath sample demand at the roadside, is a s. 9 detention. At the other end of the spectrum, however, are "encounters between individual and [the] police where it would be clear to a reasonable person that the individual is not being deprived of a meaningful choice whether or not to cooperate with a police demand or directive and hence not detained." The Court then went on to describe three common encounters where there would be no detention:

"Effective law enforcement is highly dependent on the cooperation of members of the public. The police must be able to act in a manner that fosters this cooperation, not discourage it. However, police investigative powers are not without limits."

- **Non-Adversarial Assists or Information Gathering**

  We may rule out at the outset situations where the police are acting in a non-adversarial role and assisting members of the public in circumstances commonly accepted as lacking the essential character of a detention. In many common situations, reasonable people understand that the police are not constraining individual choices, but rather helping people or gathering information. For instance, the reasonable person would understand that a police officer who attends at a medical emergency on a 911 call is not detaining the individuals he or she encounters. This is so even if the police in taking control of the situation, effectively interfere with an individual's freedom of movement. Such deprivations of liberty will not be significant enough to attract Charter scrutiny because they do not attract legal consequences for the concerned individuals. [para. 36]

- **Preliminary Investigation**

  Another often-discussed situation is when police officers approach bystanders in the wake of an accident or crime, to determine if they witnessed the event and obtain information that may assist in their investigation. While many people may be happy to assist the police, the law is clear that, subject to specific provisions that may exceptionally govern, the citizen is free to walk away. Given the existence of such a generally understood right in such circumstances, a reasonable person would not conclude that his or her right to choose whether to cooperate with them has been taken away. This conclusion holds true even if the person may feel compelled to cooperate with the police out of a sense of moral or civic duty. ...

  In the context of investigating an accident or a crime, the police, unbeknownst to them at that point in time, may find themselves asking questions of a person who is implicated in the occurrence and, consequently, is at risk of self-incrimination. This does not preclude the police from continuing to question the person in the pursuit of their investigation. Section 9 of the Charter does not require that police abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime. Nor does s. 10 require that the police advise everyone at the outset of any encounter that they have no obligation to speak to them and are entitled to legal counsel.

"In many common situations, reasonable people understand that the police are not constraining individual choices, but rather helping people or gathering information. For instance, the reasonable person would understand that a police officer who attends at a medical emergency on a 911 call is not detaining the individuals he or she encounters."

Effective law enforcement is highly dependent on the cooperation of members of the public. The police must be able to act in a manner that fosters this cooperation, not discourage it. However, police investigative powers are not without limits. The notion of psychological detention recognizes the reality that police tactics, even in the absence of exercising actual physical restraint, may be coercive enough to effectively remove the individual's choice to walk away from the police.

This creates the risk that the person may reasonably feel compelled to incriminate himself or herself. Where that is the case, the police are no longer entitled simply to expect cooperation from an individual. Unless, as stated earlier, the police inform the person that he or she is under no obligation to answer questions and is free to go, a detention may well crystallize and, when it does, the police must provide the subject with his or her s. 10(b) rights. That the obligation arises only on detention represents part of the balance between, on the one hand, the individual rights protected by ss. 9 and 10 and enjoyed by all members of society, and on the other, the collective interest of all members of society in the ability of the police to act on their behalf to investigate and prevent crime. [references omitted, para. 37-39]

- **Neighbourhood or Community Policing**

A more complex situation may arise in the context of neighbourhood policing where the police are not responding to any specific occurrence, but where the non-coercive police role of assisting in meeting needs or maintaining basic order can subtly merge with the potentially coercive police role of investigating crime and arresting suspects so that they may be brought to justice. This is the situation that arises in this case.

... [G]eneral inquiries by a patrolling officer present no threat to freedom of choice. On the other hand, such inquiries can escalate into situations where the focus shifts from general community-oriented concern to suspicion of a particular individual. Focussed suspicion, in and of itself, does not turn the encounter in a detention. What matters is how the police, based on that suspicion, interacted with the subject. The language of the Charter does not confine detention to situations where a person is in potential jeopardy of arrest. However, this is a factor that may help to determine whether, in a particular circumstance, a reasonable person would conclude he or she had no choice but to comply with a police officer's request. The police must be mindful that, depending on how they act and what they say, the point may be reached where a reasonable person, in the position of that individual, would conclude he or she is not free to choose to walk away or decline to answer questions. [paras. 40-41]

LEGALLY SPEAKING:
Psychological Detention

"In summary, we conclude as follows:

1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:

   a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

   b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

   c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication."

Was the Accused Detained?

Because this was not a clear case of physical restraint or compulsion by operation of law, the Court needed to consider all the relevant circumstances to determine if a reasonable person in the accused's position would have concluded that their right to choose how to interact with the police (i.e. whether to leave or comply) had been removed. At the point the uniformed officer stepped in the accused's path and made general inquiries there was no detention. "Such preliminary questioning is a legitimate exercise of police powers," said the Court. "At this stage, a reasonable person would not have concluded he or she was being deprived of the right to choose how to act, and for that reason there was no detention." However, once he was told to keep his hands in front of him he was detained. Although telling him to do this by itself may be insufficient to indicate detention since it may be simply a precautionary directive, looking at the entire context of what transpired from this point forward led the Court to conclude the accused was detained when the uniformed officer told him to keep his hands in front of him, the other two officers moved into position, and the officer embarked on a pointed line of questioning:

> Two other officers approached, flashing their badges and taking tactical adversarial positions behind [the uniformed officer]. The encounter developed into one where [the accused] was singled out as the object of particularized suspicion, as evidenced by the conduct of the officers. The nature of the questioning changed from ascertaining the appellant's identity to determining whether he "had anything that he shouldn't". At this point the encounter took on the character of an interrogation, going from general neighbourhood policing to a situation where the police had effectively taken control over the appellant and were attempting to elicit incriminating information.
>
> Although [the uniformed officer] was respectful in his questioning, the encounter was inherently intimidating. The power imbalance was obviously exacerbated by [the accused's] youth and inexperience. [The accused] did not testify, so we do not know what his perceptions of the interaction actually were. However, because the test is an objective one, this is not fatal to his argument that there was a detention. ... In our view, the evidence supports [the accused's] contention that a reasonable person in his position (18 years old, alone, faced by three physically larger policemen in adversarial positions) would conclude that his or her right to choose how to act had been removed by the police, given their conduct.
>
> The police conduct that gave rise to an impression of control was not fleeting. The direction to [the accused] to keep his hands in front, in itself inconclusive, was followed by the appearance of two other officers flashing their badges and by questioning driven by focussed suspicion of [the accused]. The sustained and restrictive tenor of the conduct after the direction to [the accused] to keep his hands in front of him reasonably supports the conclusion that the officers were putting him under their control and depriving him of his choice as to how to respond. [paras. 49-51]

> "[G]eneral inquiries by a patrolling officer present no threat to freedom of choice. On the other hand, such inquiries can escalate into situations where the focus shifts from general community-oriented concern to suspicion of a particular individual. Focussed suspicion, in and of itself, does not turn the encounter in a detention. What matters is how the police, based on that suspicion, interacted with the subject."

Was the Detention Arbitrary?

If a detention is lawful it will not be arbitrary under s.9 unless the law authorizing the detention is itself arbitrary. Said another way, an unlawful detention will be arbitrary and will violate the *Charter*. This is similar to the s.8 framework that held a search will be reasonable, in part, if it is authorized by a reasonable law. "[I]t should now be understood that for a detention to be non-arbitrary, it must be authorized by a law which is itself non-arbitrary," said the Court. "[A]s with other rights, the s. 9 prohibition of arbitrary detention may be limited under s. 1 by such measures 'prescribed by law as can be demonstrably

justified in a free and democratic society'".

In this case the officers said they did not have legal grounds or reasonable suspicion to detain the accused prior to his incriminating statements. The detention was therefore arbitrary and breached s.9.

Was s.10(b) Breached?

Relying on *R. v. Suberu* the Court concluded that the s.10(b) right to counsel arose immediately upon detention, whether or not the detention was solely for investigative purposes. Thus, s.10(b) required the police to advise the accused that he had the right to speak to a lawyer and to give him a reasonable opportunity to obtain legal advice if he so chose, before proceeding to elicit incriminating information from him. Since the police didn't comply with s.10(b) (because they didn't believe there was a detention) they breached the accused's s.10(b) rights.

Was the Evidence Admissible?

Before determining whether the evidence should be admitted or excluded under s.24(2) of the *Charter*, the Court revised its prior approach of grouping the factors to be considered under trial fairness (conscriptive or non-conscriptive evidence), the seriousness of the *Charter* breach, and the effect of excluding the evidence on the repute of the administration of justice.

The Purpose of s.24(2)

Section 24(2) reads:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

> "[I]t should now be understood that for a detention to be non-arbitrary, it must be authorized by a law which is itself non-arbitrary. ... [T]he s. 9 prohibition of arbitrary detention may be limited under s. 1 by such measures 'prescribed by law as can be demonstrably justified in a free and democratic society'".

Although the administration of justice is generally used to describe the process by which a law breaker is investigated, charged and tried, it more broadly embraces maintaining the rule of law and upholding *Charter* rights in the justice system. The Court described the focus of s.24(2) as:

> The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute.
>
> Section 24(2)'s focus is not only long-term, but prospective. The fact of the Charter breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.
>
> Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system. [paras. 68-70]

> "s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system."

A New Approach

In assessing and balancing the effect of admitting *Charter* tainted evidence on society's confidence in the justice system, the new approach requires a court to look at the following three lines of enquiry and determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute:

3. Seriousness of the Charter-Infringing Conduct.

- Would admitting the evidence send a message to the public that the courts condone the state's unlawful conduct by failing to dissociate themselves from the fruits of it?
- Was the *Charter* breach severe or deliberate or was it inadvertent or minor? The more severe the breach the greater need for courts to dissociate itself by excluding the evidence.
- Were there any extenuating circumstances that may attenuate the breach such as preserving evidence or good faith? Or were the police ignorant of *Charter* standards or act wilfully, or flagrantly? Deliberate *Charter* misconduct or conduct that is part of a pattern of abuse tends to support exclusion of evidence.

4. Impact of the Charter-Protected Interests of the Accused

- What right was infringed and how did it impact the accused? For example, a statement obtained by police can breach the s.7 right to silence stemming from the principle against self incrimination. The more serious the impact on the accused's *Charter*-protected interests, the greater the risk of exclusion.

5. Society's Interest in an Adjudication on the Merits

- Would the truth seeking function of a criminal trial be better served by admitting or excluding the evidence, balanced against the integrity of the justice system? Considerations in this line of inquiry include the reliability of the evidence and the importance of the evidence to the prosecutions case.

SIDEBAR

Another issue the Supreme Court had to decide in the *Grant* case was whether the word "transfer" found in ss. 84, 99, and 100 of the *Criminal Code* meant simply to transport. In this case, the accused was convicted of possessing a firearm for the purpose of weapons trafficking (s.100(1)). A majority of the Ontario Court of Appeal found the word transfer for the purposes of the trafficking section meant to carry, convey or remove from one place to another. Because the accused had admitted that he was "dropping off" the gun somewhere up the road, he was moving it from one place to another and therefore transferring it.

The Supreme Court ruled that the simple movement of a firearm from one place to another was not transferring it for the purposes of the section. A more restrictive meaning for transfer, other than to simply transport, was required because:

- the common element of the definition of transfer, such as sell, provide, barter, give, lend, rent, sent, transport, ship, distribute or deliver is a transaction;
- the words "whether or not for consideration" that accompany the transferring suggests Parliament did not want to criminalize the simple movement of firearms, again suggesting transfer is transactional in nature;
- there are other provisions that deal with "transfers" falling short of trafficking; and
- s.100 in the *Criminal Code* is deemed to be a trafficking offence which now carries a mandatory three year prison sentence for a first time conviction. Parliament did not intend anyone moving a firearm from place to place without authorization to be a weapons trafficker liable to this minimum sentence.

The conviction on the firearm charge related to this issue was overturned and an acquittal was entered.

Types of Evidence

The Court also looked at four types of evidence (statements, bodily evidence, non-bodily physical evidence, and derivative evidence) and discussed how their revised approach could treat these types of evidence (see Evidence Admission/Exclusion Grid)

In this case the Supreme Court held the gun, which was classified as derivative evidence since it was discovered as a result of statements taken in breach of the *Charter* (ss. 9 and 10(b)), was admissible using its revised approach because its admission, on balance, would not bring the administration of justice into disrepute:

1. seriousness of police conduct

- the police were not abusive;
- the accused was not the target of racial profiling or other discriminatory practices;
- the point at which an encounter becomes a detention is not always clear;
- the accused's detention was an understandable mistake;
- the error in not providing s.10(b) was understandable since the police mistakenly believed the accused was not detained;
- the police did not act in bad faith;
- the breach was not deliberate or egregious.

weighs in favour of admission

2. impact of breach on the accused

- s.9 breach
  - deprived the accused of his liberty interests;
  - detention did not involve physical coercion nor was it abusive;
  - impact of breach not severe but more than minimal.
- s.10(b) breach
  - accused's incriminating statements were prompted directly from pointed questioning;
  - the accused was in need of legal advice but was not told he could call a lawyer;
  - the evidence was non-discoverable. Police said they would not have searched the accused absent his self-incriminatory statements nor did they have the grounds to do so.

weighs in favour of exclusion

3. society's interest

- the value of the evidence was considerable;
- the gun was highly reliable evidence;
- the gun was essential to the Crown's case.

weighs in favour of admission

As a result of the revised s.24(2) analysis, the gun was admitted as evidence and the convictions were upheld, save the possession of a firearm charge for the purpose of unlawfully transferring it (see SIDEBAR discussion on page 29).

A Pair in Partial (Dis)agreement

Two justices disagreed with the majority in some respects, while agreeing in others. Justice Binnie agreed the accused was arbitrarily detained, with the majority's revised s.24(2) framework, and that the evidence was admissible, but differed on the approach to defining detention. In his view, the test proposed by the majority was strictly an objective assessment divorced from the perception of the parties involved. He opined that that the perceptions of the police could be significant in the analysis, such as why they initiated the encounter:

> It is not controversial that in the early stages of a criminal investigation the police must be afforded some flexibility before the lawyers get involved. The police do have the right to ask questions and they need to seek the co-operation of members of the public, including those who turn out to be miscreants. ... In my view ... a better and broader approach to detention would explicitly take into account (i) the objective facts of such encounters, whether or not evident to the person stopped, as well as (ii) the perception of the police in initiating the encounter, whether or not evident to the person stopped, and (iii) whatever information the police possess at the time, which may or may not be known to the person stopped, as well as whatever change in the police perception occurs as the encounter develops. These matters should all be factored into a more comprehensive analysis of when a "detention" occurs for Charter purposes than is provided in the ... claimant-centred approach affirmed today by the Court. [para. 180]

Justice Deschamps also agreed that the accused was arbitrarily detained and that the evidence was admissible. She noted the officers were calm and polite and the detention was most likely not intentional. She suggested that if the police "do not really intend to detain a person, they should - by their deeds and their words - let the person know that he or she is not being singled out." But she disagreed with the majority's s.24(2) framework. In her view, there were only two aspects to consider in the 24(2) analysis: (1) the public interest in protecting *Charter* rights and the public interest in an adjudication of a case on its merits.

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

EVIDENCE ADMISSION/EXCLUSION GRID

Evidence Type	Statements	Bodily Evidence	Non-Bodily Physical Evidence	Derivative Evidence
Considerations	• statements engage the principle against self incrimination, a cornerstone of criminal law, from which a number of common law & *Charter* rules emanate including the confessions rule, the rights to silence (s.7), counsel (s. 10(b)), non-compellability (s. 11(c), and use immunity (s.13). • presumptive, but not automatic, exclusion	• evidence taken from the body of the accused, such as DNA or breath samples • plucking a hair from a suspect's head may not be intrusive & privacy interest may be relatively slight whereas a body cavity or strip search may be intrusive, demeaning & objectionable • where intrusion on bodily integrity is deliberate and impact on accused's privacy, bodily integrity & dignity is high, evidence will generally be excluded even though relevant and reliable	• eg. drugs, gun • see for example *R. v. Harrison*, 2009 SCC 34 (at p. 33)	• refers to physical evidence discovered as a result of an unlawfully obtained statement
Seriousness of the Charter-Infringing State Conduct (admission may send the message that the justice system condones serious state misconduct)	• examine police conduct in obtaining statements • public confidence requires police adhere to *Charter* when obtaining statements • serious breaches more harmful than minor or inadvertent slips	• admission of evidence obtained by deliberate & egregious conduct may undermine respect for the court process • admission of evidence obtained in good faith may have little adverse effect on court process	• admission of evidence obtained by deliberate & egregious conduct may undermine respect for the court process • admission of evidence obtained in good faith may have little adverse effect on court process	• the more serious the state conduct in obtaining the statement that lead to the physical evidence the more its admission may undermine respect for the court process • Did the police deliberately & systematically flout *Charter* rights or did they act in good faith?
Impact of the Breach on the Charter-Protected Interests of the Accused (admission may send the message that individual rights count for little)	• eg. s.10(b) breach undermines right to silence & protection against testimonial self incrimination • favours exclusion	• the greater the intrusion on the accused's protected interests the more important to exclude • seriousness of intrusions vary greatly, from fingerprinting and iris-recognition technology on one end to forcibly taking blood samples or dental impressions on the other	• usually engages s.8 of the *Charter* • eg. dwelling house attracts a higher expectation of privacy than a business or automobile therefore a home search will be viewed as more serious • an unjustified strip search or body cavity search is extremely serious	• where statement is unconstitutionally obtained (usually through s.10(b) breach linked to making an informed choice about whether to talk) & accused's protected interest significantly compromised, exclusion strongly favoured • discoverability an important factor strengthening or attenuating breach • if independently discoverable, impact reduced and admission more likely
Society's Interest in the Adjudication of the Case on its Merits (truth finding v. integrity of the justice system)	• *Charter* tainted statements may be unreliable, thereby undercutting the necessity of the statement for a trial on its merits	• usually favours admission because it is generally reliable evidence	• reliability issues with physical evidence not generally related to *Charter* breach & weighs in favour of admission	• since evidence is physical there is less concern with reliability which favours admission

HATE CRIMES DROP

In May 2009 Statistics Canada released a report entitled "Police-reported hate crime in Canada, 2007". Highlights of the report include:

- There was a 13% decrease in hate crimes. In 2007 there were 785 crimes motivated by hatred towards a particular group, down from 892 crimes reported in 2006.
- About half of all police-reported hate crimes were mischief offences such as graffiti on public property. Three in ten hate crimes involved violence. Only one homicide was reportedly motivated by hate in 2007.
- The most common motivation for hate crime was race or ethnicity (62%), followed by religion (23%) and sexual orientation (10%).
- Among racially-motivated hate crimes, Blacks were the most targeted (33%), followed by East and Southeast Asian (12%), South Asian (11%), Caucasian (10%), Arab or West Asian (6%) and Aboriginal (3%).
- Among religious-motivated hate crimes, Jewish was the most targeted (69%), followed by Muslim (Islam) (16%), and Catholic (8%).
- Youths accounted for a disproportionate number of accused persons. In 2007, 32% of persons accused of hate crime were youth, which was almost twice the percentage of youth accused of crime in general (17%).

Top 3 Hate Crime Motivations

☑ Race or ethnicity	62%
☑ Religion	23%
☑ Sexual orientation	10%

Source: Statistics Canada, 2009, "Police-reported hate crime in Canada, 2007", catalogue no. 85-002-X, Vol. 29, no. 2 at page 15.

What is hate crime?

"Hate crimes refer to criminal offences that are motivated by hatred towards an identifiable group. The incident may target:

- ☑ race,
- ☑ national or ethnic origin,
- ☑ language,
- ☑ colour,
- ☑ religion,
- ☑ sex,
- ☑ age,
- ☑ mental or physical disability,
- ☑ sexual orientation or
- ☑ other factors such as occupation or political beliefs."

Source: Statistics Canada, 2009, "Police-reported hate crime in Canada, 2007", catalogue no. 85-002-X, Vol. 29, no. 2 at page 6.

TOP 10 HATE CRIMES RATES CENSUS METROPOLITAN AREAS

CMA	Rate per 100,000
Calgary, AB	8.0
Edmonton, AB	6.2
Saint John, NB	6.2
Hamilton, ON	6.0
Ottawa, ON	6.0
London, ON	5.9
Toronto, ON	5.0
Kingston, ON	4.6
Abbotsford, BC	3.5
Vancouver, BC	3.5

STOP & SEARCH A BLATANT DISREGARD FOR CHARTER RIGHTS: EVIDENCE EXCLUDED

R. v. Harrison, 2009 SCC 34

A police officer saw a Dodge Durango without a front licence plate (an offence for Ontario registered vehicles) and decided to stop it. When he activated his emergency lights and manoeuvred in behind the vehicle he noticed it had an Alberta rear licence plate and realized the vehicle did not require a front plate. He nonetheless decided not to abandon his intention to stop the vehicle because he wanted to maintain his "integrity" in the eyes of observers—he already had his emergency lights on and had begun the stop. There were two men in the vehicle. The officer asked the accused for his licence and vehicle registration, insurance and rental agreement. The accused looked for but was unable to produce his licence. During the encounter the officer noted the vehicle looked lived in—it was messy and littered with used food and drink containers—and there was clothing and bags on the back seat and two boxes in the rear compartment. Both occupants provided different versions of their association. After conducting computer checks, the officer learned the accused's drivers licence had been suspended and he was arrested for that offence.

The officer decided to search the vehicle as an incident to the arrest because the accused hadn't "identified himself properly" and the officer believed the accused's driver's licence could be within the vehicle. For safety reasons the officer asked the occupants if there were drugs or weapons inside the vehicle. He didn't want to get pricked by a needle or pull a trigger on a handgun when searching. His suspicions were also aroused that there could possibly be drugs, weapons, cash or a combination thereof inside the vehicle. He based this on his training and experience, including a Drug Interdiction Course, Both men responded in the negative to the officer's questions about the presence of drugs or weapons. The officer searched the rental vehicle anyways and found 77 pounds (35 kgs.) of cocaine with a street value of between $2,463,000 and $4,575,000 in the two boxes located in the rear area. The men were arrested for possessing cocaine for the purpose of trafficking.

At trial in the Ontario Superior Court of Justice on a charge of trafficking, the accused argued his *Charter* rights were breached and he sought to have the evidence excluded. The trial judge found the officer breached ss.8 and 9 of the *Charter*. He held the men were arbitrarily detained and that the search of the vehicle was unreasonable. In his view, the officer did not have reasonable grounds to stop and search the car and knew it. He found that the officer's explanation for stopping the vehicle and detaining its occupants was contrived and defied credibility. The search of the vehicle after arrest was not "truly incidental" to the arrest for driving while under suspension and the officer's stated purpose for the search was certainly not reasonable. The officer's actions were flagrant, brazen, not committed in good faith, and the *Charter* breaches were extremely serious. However, the judge refused to exclude the cocaine under s.24(2) because trial fairness was not compromised and the *Charter* breaches "pale in comparison to the criminality involved in the possession for the purposes of distribution of 77 pounds of cocaine..." The accused was convicted and sentenced to five years in prison.

The accused's appeal to the Ontario Court of Appeal was dismissed by a divided panel. Two judges upheld the trial judge's decision to admit the evidence, although concluding it was a close call. They acknowledged that the *Charter* breaches were serious, but found they were mitigated somewhat. The officer did not have "a carefully thought out plan or practice to breach the *Charter*" and the violations were not "deliberate". Rather, the inexperienced officer made a serious mistake - it was a flawed decision-making process, not a systemic or institutional pattern of abuse,

> "While an officer's 'hunch' is a valuable investigative tool – indeed, here it proved highly accurate – it is no substitute for proper Charter standards when interfering with a suspect's liberty."

that lead to the breaches. As well, the detention was brief, not physically coercive and the accused's expectation of privacy in the contents of the vehicle was not great - compared to a person's body, home, or office. Further, the accused denied that the boxes containing the cocaine belonged to him, further mitigating any privacy violation. Thus, the effects of the *Charter* breaches on the accused were relatively minor. In the dissenting judge's view, the breaches were intentional violations that undermined the integrity of the administration of justice and condoning the constitutional misconduct by admitting the evidence obtained would do more harm to the integrity of the justice system than would excluding evidence. She would have allowed the appeal and entered an acquittal.

The accused then appealed to the Supreme Court of Canada which, using the revised s.24(2) *Charter* analysis developed in *R. v. Grant* (see p. 22), would have excluded the evidence by a 6:1 majority. In this case, the accused's rights under ss. 8 and 9 of the *Charter* were violated by the detention and search. The officer should not have made the initial stop because he knew that the accused's vehicle did not require a front licence plate before pulling it over. "A vague concern for the 'integrity' of the police, even if genuine, was clearly an inadequate reason to follow through with the detention," said the majority. "The subsequent search of the S.U.V. was not incidental to the [accused's] arrest for driving under a suspension and was likewise in breach of the Charter. While an officer's "hunch" is a valuable investigative tool – indeed, here it proved highly accurate – it is no substitute for proper Charter standards when interfering with a suspect's liberty."

The Court then went on to determine whether the evidence was admissible under their revised s.24(2) approach using the following three lines of inquiry:

(1) the seriousness of the Charter-infringing state conduct.

> Did it involve misconduct from which the court should be concerned to dissociate itself? This will be the case where the departure from Charter standards was major in degree, or where the police knew (or should have known) that their conduct was not Charter-compliant. On the other hand, where the breach was of a merely technical nature or the result of an understandable mistake, dissociation is much less of a concern. [para. 22]

- the breaches were serious and represented a reckless and blatant disregard for *Charter* rights;
- reasonable grounds for the initial stop was entirely non-existent;
- reasonable grounds for the search were also non-existent;
- the officer's in court testimony was misleading.

weighs in favour of exclusion

(2) the impact of the breach on the Charter-protected interests of the accused.

> This factor looks at the seriousness of the infringement from the perspective of the accused. Did the breach seriously compromise the interests underlying the right(s) infringed? Or was the breach merely transient or trivial in its impact? These are among the questions that fall for consideration in this inquiry. [para. 28]

- the detention was intended to brief and there was a lower expectation of privacy in the vehicle:

> [M]otorists have a lower expectation of privacy in their vehicles than they do in their homes. As participants in a highly regulated activity, they know that they may be stopped for reasons pertaining to highway safety — as in a drinking-and-driving roadblock, for instance. Had it not turned up incriminating evidence, the detention would have been brief. In these respects, the intrusion on liberty and privacy represented by the detention is less severe than it would be in the case of a pedestrian. Further, nothing in the encounter was demeaning to the dignity of the [accused]. [para. 30]

- but, being stopped and searched without lawful justification is much more than trivial;

- the accused had the expectation to be left alone, absent a valid highway traffic stop;
- although not egregious, the deprivation of the accused's liberty and privacy was significant.

weighs in favour of exclusion

3. society's interest in the adjudication of the case on its merits.

At this stage, the court considers factors such as the reliability of the evidence and its importance to the Crown's case. [para. 33]

- the drugs were highly reliable evidence;
- the drugs were critical to the Crown's case;
- the charge was very serious.

weighs in favour of admission

In concluding the evidence was inadmissible and that "the price paid by society for an acquittal in these circumstances is outweighed by the importance of maintaining Charter standards" the Court stated:

> The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed. [para. 36]

And further:

> ... The police misconduct was serious; indeed, the trial judge found that it represented a "brazen and flagrant" disregard of the Charter. To appear to condone wilful and flagrant Charter breaches that constituted a significant incursion on the appellant's rights does not enhance the long-term repute of the administration of justice; on the contrary, it undermines it. In this case, the seriousness of the offence and the reliability of the evidence, while important, do not outweigh the factors pointing to exclusion.
>
> ... [A]llowing the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis "would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the Charter and, in effect, declare that in the administration of the criminal law 'the ends justify the means'".... Charter protections must be construed so as to apply to everyone, even those alleged to have committed the most serious criminal offences. ... [T]he trial judge seemed to imply that where the evidence is reliable and the charge is serious, admission will always be the result. ... [T]his is not the law.
>
> Additionally, the trial judge's observation that the Charter breaches "pale in comparison to the criminality involved" in drug trafficking risked the appearance of turning the s. 24(2) inquiry into a contest between the misdeeds of the police and those of the accused. The fact that a Charter breach is less heinous than the offence charged does not advance the inquiry mandated by s. 24(2). We expect police to adhere to higher standards than alleged criminals. [paras. 39-41]

"We expect police to adhere to higher standards than alleged criminals."

The evidence was excluded and an acquittal was entered.

A Lone Dissenter

Justice Deschamps disagreed with her colleagues and would have admitted the evidence. In her view, "the public interest in an adjudication on the merits is paramount, and this is a case in which excluding the evidence will have a negative effect on the confidence of an objective person, fully informed of all the circumstances, in the administration of justice."

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

INVESTIGATIVE DETENTION TRIGGERS s.10(b) RIGHT TO COUNSEL

R. v. Suberu, 2009 SCC 33

Police were called to a Liquor Control Board of Ontario (LCBO) store where a man was attempting to purchase a $3 bottle of beer using a $100 LCBO gift certificate obtained earlier that day in another town using a stolen credit card. An employee tried to stall the man until police arrived. As police arrived one officer spoke to the other man while a second officer approached the accused as he walked towards the exit. The accused said, "He did this, not me, so I guess I can go." The officer followed him out of the store and as the accused was getting into the driver's seat of a minivan said, "Wait a minute. I need to talk to you before you go anywhere." The officer then had a brief conversation with the accused where a series of questions were asked, including where he was from, who the male inside the store was, and who owned the van. At the time however, the accused was not advised of his right to counsel under s.10(b) of the *Charter*.

The officer was then advised by police radio that two suspects had purchased the gift certificates using a stolen credit card. A vehicle description and licence plate number was also provided which matched the accused's vehicle. The officer asked the accused for identification and vehicle ownership papers. While the accused retrieved the documents the officer saw an LCBO bag containing liquor, Wal-Mart bags, and several boxes with new merchandise behind the front seat. At this point the accused was arrested for fraud, but interrupted the officer by protesting his innocence. The van was subsequently searched and police found a black purse with information pertaining to the owner of the stolen credit and debit cards.

At trial in the Ontario Court of Justice the officer detaining the accused said he did so because he was not sure whether the accused was involved in the incident nor the extent of his involvement if he was. The officer explained his purpose for questioning was to look into what was going on. The trial judge concluded that the circumstances of this case involved a "momentary investigative detention" and the officer's questions were merely preliminary or exploratory to determine if their was any involvement by the accused. The trial judge determined that the accused's right to counsel under s.10(b) was not triggered until a few minutes into the encounter when the officer determined the accused was involved in the incident and that he could not let him go - a point that happened to coincide with arrest. There was no *Charter* breach and the accused was convicted of possession of a credit card obtained by crime and two counts of possession of property obtained by crime under $5,000. He was sentenced to 90 days in jail and placed on probation for a year.

The accused's appeal to the Ontario Superior Court of Justice was dismissed. The Superior Court Justice found s.10(b) was not engaged by an investigative detention. On further appeal to the Ontario Court of Appeal, the unanimous panel found the accused had been detained at the outset of the encounter with the officer. However, the Court interpreted the words "without delay" found in s.10(b) allowed for a brief interlude between the beginning of an investigative detention and advising the detainee of their right to counsel. It is during this time that the police may ask exploratory questions to determine whether more than a brief detention is necessary. Since the officer did inform the accused of his right to counsel without delay - taking into account the permissible interlude - s.10(b) was not violated. The accused's appeal was therefore dismissed.

The accused then appealed to the Supreme Court of Canada which had to determine whether the accused was detained, and if so, how s.10(b) applied to the circumstances.

Was there a Detention?

The accused argued that he was detained sometime prior to his arrest. He submitted that the conduct of the officer during the initial part of the encounter effectively detained him and thereby triggered his right to counsel under s.10(b).

In *R. v. Grant*, the Supreme Court "adopted a purposive approach to the definition of 'detention'

and held that a 'detention' for the purposes of the Charter refers to a suspension of an individual's liberty interest by virtue of a significant physical or psychological restraint at the hands of the state." Because a detention can manifest in both physical and psychological forms, "police actions short of holding an individual behind bars or in handcuffs can be coercive enough to engage the rights protected by ss. 9 and 10 of the Charter." But not every encounter with police will be a detention:

> ... [N]ot every interaction between the police and members of the public, even for investigative purposes, constitutes a detention within the meaning of the Charter. Section 9 of the Charter does not dictate that police abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime. Likewise, not every police encounter, even with a suspect, will trigger an individual's right to counsel under s. 10(b). ...
>
> ...[I]t is clear that an individual may be detained within the meaning of the Charter without being subject to actual physical restraint. Where the subject is legally required to comply with a demand or direction that interferes with his or her liberty, detention is usually easily made out. Where there is no legal obligation to comply but a reasonable person in the subject's position would conclude that he or she had been deprived of the liberty of choice, a detention is also established.
>
> Even when an encounter clearly results in a detention, for example when the person is ultimately arrested and taken in police custody, it cannot simply be assumed that there was a detention from the beginning of the interaction. Given the immediacy of the s. 10(b) obligation to inform a detainee of his or her right to counsel, it is important to determine if and when an encounter between the police and an individual effectively crystallizes in a detention. It will depend on the circumstances. It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed. [paras. 3-5]

"[N]ot every interaction between the police and members of the public, even for investigative purposes, constitutes a detention within the meaning of the Charter. Section 9 of the Charter does not dictate that police abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime. Likewise, not every police encounter, even with a suspect, will trigger an individual's right to counsel under s. 10(b)."

And further:

> While a detention is clearly indicated by the existence of physical restraint or a legal obligation to comply with a police demand, a detention can also be grounded when police conduct would cause a reasonable person to conclude that he or she no longer had the freedom to choose whether or not to cooperate with the police. ... [T]his is an objective determination, made in light of the circumstances of an encounter as a whole.
>
> However, this latter understanding of detention does not mean that every interaction with the police will amount to a detention for the purposes of the Charter, even when a person is under investigation for criminal activity, is asked questions, or is physically delayed by contact with the police. ...
>
> ... [T]he meaning of "detention" can only be determined by adopting a purposive approach that neither overshoots nor impoverishes the protection intended by the Charter right in question. It necessitates striking a balance between society's interest in effective policing and the detainee's interest in robust Charter rights. To simply assume that a

"Where there is no legal obligation to comply but a reasonable person in the subject's position would conclude that he or she had been deprived of the liberty of choice, a detention is also established."

detention occurs every time a person is delayed from going on his or her way because of the police accosting him or her during the course of an investigation, without considering whether or not the interaction involved a significant deprivation of liberty would overshoot the purpose of the Charter. [paras. 22-24]

"[I]n a situation where the police believe a crime has recently been committed, the police may engage in preliminary questioning of bystanders without giving rise to a detention under ss. 9 and 10 of the Charter. Despite a police request for information or assistance, a bystander is under no legal obligation to comply."

In this case the obvious markers of detention were not present. The accused was not physically restrained prior to his arrest nor would he have been subject to legal sanction for refusing to comply with the officer's request that he "wait". But would "the officer's conduct in the context of the encounter as a whole would cause a reasonable person in the same situation to conclude that he or she was not free to go and that he or she had to comply with the officer's request"? On this point the Supreme Court stated:

> ...[I]n a situation where the police believe a crime has recently been committed, the police may engage in preliminary questioning of bystanders without giving rise to a detention under ss. 9 and 10 of the Charter. Despite a police request for information or assistance, a bystander is under no legal obligation to comply. This legal proposition must inform the perspective of the reasonable person in the circumstances of the person being questioned. The onus is on the applicant to show that in the circumstances he or she was effectively deprived of his or her liberty of choice. The test is an objective one and the failure of the applicant to testify as to his or her perceptions of the encounter is not fatal to the application. However, the applicant's contention that the police by their conduct effected a significant deprivation of his or her liberty must find support in the evidence.

"[I]n a situation where the police believe a crime has recently been committed, the police may engage in preliminary questioning of bystanders without giving rise to a detention under ss. 9 and 10 of the Charter. "

"Even when an encounter clearly results in a detention, for example when the person is ultimately arrested and taken in police custody, it cannot simply be assumed that there was a detention from the beginning of the interaction. "

The line between general questioning and focussed interrogation amounting to detention may be difficult to draw in particular cases. It is the task of the trial judge on a Charter application to assess the circumstances and determine whether the line between general questioning and detention has been crossed. [The trial judge's] findings on the facts, supported by the evidence, lead to the view that a reasonable person in the circumstances would have concluded that the initial encounter was preliminary investigative questioning falling short of detention. [paras. 28-29]

Using the three factors of assessing a psychological detention absent a legal obligation to comply, the Supreme Court held the trial judge's findings supported the view that the accused was not under detention:

- **circumstances of the encounter**
  - the initial part of the encounter was of a preliminary or exploratory nature;
  - the officer was engaged in a general inquiry;
  - the officer had not yet zeroed in on the accused as someone whose movements must be controlled;
  - a possible crime had just occurred and the police had arrived to investigate;

- the officer engaged the accused in an attempt to orient himself to the unfolding situation:

  > [I]t would be absurd to suggest that [the officer] should give everyone present their right to counsel before proceeding to sort out the situation. ... [I]t would also be unreasonable to require that the right to counsel be given the moment the police approach any suspect in the process of sorting out the situation. In the circumstances here, one man appeared to be involved in the matter under investigation and another, [the accused], had attracted attention. [The officer] was engaging him to determine... 'if there was any involvement by this person'. ... [I]t occurred to [the officer] that this man might be involved. However ... he did not at that time believe he had sufficient information to act on his suspicion by detaining [the accused]. It was only after he received additional information over the radio linking the [accused], the van, and the contents of the van to an offence that he believed the [accused] was involved in a criminal act such that he could not allow the [accused] to leave the scene. As a whole, the circumstances of the encounter support a reasonable perception that [the officer] was orienting himself to the situation rather than intending to deprive [the accused] of his liberty. Further, [the accused] did not testify or call evidence on that matter. In summary, the circumstances ... do not suggest detention. [para. 32]

- **conduct of the police**
  - Did the police conduct, taken as a whole, support a reasonable conclusion that the accused had no choice but to comply?
  - Although the officer said, "Wait a minute, I need to talk to you before you do anywhere," he did not obstruct the accused's movement but rather simply spoke to him as he sat in his van;
  - the encounter was "a very brief dialogue";
  - the conduct of the officer viewed objectively supported the view that only preliminary questioning was occurring to find out whether to proceed further.
- **characteristics of the individual**
  - Would a reasonable person in the circumstances have concluded by reason of the state conduct that he or she had no choice but to comply?

    > ...[T]he fact that a person is delayed by the police is insufficient to ground a reasonable conclusion that he or she was not free to go, or that he or she was bound to comply with the officer's request for information. [The accused] did not testify on the application, and there was no evidence as to whether he subjectively believed that he could not leave. Nor was there evidence of his personal circumstances, feelings or knowledge. The only evidence came from [the officer] ... that he was merely "exploring the situation". The Officer testified that [the accused] never told him that he did not wish to speak with him, and that the conversation was not "strained". [para. 34]

As a result, the Supreme Court concluded that the accused was not detained prior to his arrest.

Was s.10(b) Triggered?

Although "[t]here was no right to counsel because there was no detention," the Supreme Court felt it necessary to decide "whether the right to retain and instruct counsel 'without delay' means that these duties must be executed immediately at the outset of a detention, or whether these duties manifest at some later point subsequent to the start of a detention."

Section 10(b) protects the right of a person in detention or under arrest to obtain legal counsel. It reads:

> Everyone has the right on arrest or detention...(b) to retain and instruct counsel without delay and to be informed of that right; ...

In describing the rights afforded by s.10(b) the Supreme Court stated:

> Once engaged, s.10(b) imposes both informational and implementational duties on the police. The informational duty requires that the detainee be informed of the right to retain and instruct counsel without delay. The implementational obligation imposed on the police under s. 10(b), requires the police to provide the detainee with a reasonable opportunity to retain and instruct counsel. This obligation also requires the police to refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach a lawyer, or the detainee has unequivocally waived the right to do so. [para. 38]

"There was no right to counsel because there was no detention."

The Court then went on to hold that if there is a detention, the police must inform an individual of a right to counsel immediately upon detention, even short investigatory ones:

> ... The concerns regarding compelled self-incrimination and the interference with liberty that s.10(b) seeks to address are present as soon as a detention is effected. Therefore, from the moment an individual is detained, s. 10(b) is engaged and, as the words of the provision dictate, the police have the obligation to inform the detainee of his or her right to counsel "without delay". The immediacy of this obligation is only subject to concerns for officer or public safety, or to reasonable limitations that are prescribed by law and justified under s. 1 of the Charter. [para. 2]

And further:

> ... [T]he purpose of s.10(b) is to ensure that individuals know of their right to counsel, and have access to it, in situations where they suffer a significant deprivation of liberty due to state coercion which leaves them vulnerable to the exercise of state power and in a position of legal jeopardy. Specifically, the right to counsel is meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination.
>
> A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s.10(b) seeks to address are present as soon as a detention is effected. In order to protect against the risk of self-incrimination that results from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase "without delay" must be interpreted as "immediately". If the s. 10(b) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.
>
> To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(b) creates an ill-defined and unworkable test of the application of the s. 10(b) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words "without delay" mean "immediately" for the purposes of s.10(b). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s.1 of the Charter, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention. [paras. 40-42]

"[T]he words 'without delay' mean 'immediately' for the purposes of s. 10(b). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the Charter, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention."

The Crown's contention that the police could suspend the right to counsel in the course of short investigatory detentions as a reasonable limit under s.1 of the *Charter* was rejected. There are circumstances where the police pull over a driver and give a demand for sobriety tests without providing s. 10(b) rights. But that breach is saved under s. 1. The Supreme Court, however, was not persuaded that there should be a general suspension of the s.10(b) right to counsel for investigatory purposes, with or without some form of use immunity such that incriminating evidence gathered prior to informing an individual of his s.10(b) right would be inadmissible. "Because the definition of detention ... gives the police leeway to engage members of the public in non-coercive, exploratory questioning without necessarily triggering their Charter rights relating to detention," said the Court, "s.1 need not be invoked in order to allow the police to effectively fulfill their investigative duties."

The majority would have rejected the accused's appeal and upheld the convictions.

A Second View By Two

Although Justice Binnie agreed that the right to counsel was triggered by an investigatory detention - "without delay" means immediately - he disagreed with the majority that there was no detention in this case. Justice Binnie believed that the accused was subject to an investigative detention at the outset of the encounter. "The police at this stage were not making 'general inquiries', but were responding to a 'specific occurrence', in which a 'particular individual' trying lamely to deflect attention, was actually attracting attention to himself," said Justice Binnie. "The verbal exchange between [the officer and the accused] clearly established an unambiguous police order. ... It was clear to [the accused] that he was not free to go 'anywhere' and any reasonable person in that position would have come to the same conclusion."

The detention was unsupported by a reasonable suspicion and was therefore arbitrary. In Justice Binnie's opinion, the self-incriminatory statements obtained prior to the s.10(b) rights being read ought to be excluded under s.24(2). Justice Binnie would have ordered a new trial. Justice Fish agreed with the majority's test for detention, but agreed with Justice Binnie that "[n]o rational person in [the accused's] position would have thought that he was free to walk away or that the police would have let him go, had he tried." Justice Fish would have also excluded the accused's statement and order a new trial.

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

INVESTIGATIVE DETENTION: A "MANN"LY REMINDER

"[P]olice officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. ... [T]he investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest...." - *R. v. Mann*, 2004 SCC 52 per majority at para. 45.

Note-able Quote

"A good objective of leadership is to help those who are doing poorly to do well and to help those who are doing well to do even better. " ~ Jim Rohn

NO PRIVACY IN GARBAGE PUT OUT FOR COLLECTION

R. v. Patrick, 2009 SCC 17

Suspecting the accused was operating an ecstasy lab in his home, police investigators, on several occasions, took bags from within lidless garbage cans that had been placed just inside his property line—parallel to and contiguous to a back alleyway. The officers needed to reach through the airspace over the property line in order to retrieve the bags. Police seized various items, including tornup chemical recipes and instructions, gloves, used duct tape, paper towel sheets, packaging for rubber gloves, packaging for a digital scale, a product card for a vacuum pump, a balloon, a receipt for muriatic acid and an empty clear plastic bag with residue inside. Some of the items bore a detectable odour of sassafras oil and some were found to be contaminated with ecstasy. Using these items, along with other information, the police obtained a search warrant for the accused's home and found 2,679 MDA pills and other evidence. He was charged with unlawfully producing, possessing, and trafficking MDA.

At trial in Alberta Provincial Court the accused argued the police inspection of his garbage was an unreasonable search under the *Charter* and they would not have been able to obtain the search warrant without the information they derived from it. Thus, the resultant search warrant was tainted and the search of his home was a s.8 *Charter* breach. And since the breach was serious, the accused submitted that admission of the evidence would bring the administration of justice into disrepute. The trial judge, however, found the accused did not have a reasonable expectation of privacy in the items seized from his garbage, the search warrant was therefore valid, and the search of his home was lawful. The evidence was admitted and the accused was convicted of unlawfully producing, possessing and trafficking ecstasy.

The accused's appeal to the Alberta Court of Appeal was unsuccessful. A majority of the Court agreed with the trial judge that the accused did not have a reasonable expectation of privacy. The items found did not reveal "intimate details of lifestyle or core biographical details to which privacy protection ought to be extended." By placing the items in the garbage to be picked up by garbage collectors, the accused relinquished control over the items and a reasonable person would not expect garbage to be secure and private. The accused's conviction was upheld.

Justice Conrad, on the other hand, opined that the contents of the garbage bags did disclose personal and biographical information about the accused's lifestyle and personal choices which enabled the police to draw conclusions about what he was doing inside his house. As well, in her view, the trial judge failed to consider territorial privacy in the home and its perimeter (yard)—the garbage was inside the property line. The accused had not relinquished his privacy interest in the articles still on his property in opaque sealed bags which were subject to his power of retrieval at the time when they were collected by the police. Finding a reasonable expectation of privacy, Justice Conrad concluded the police breached s.8, would have excluded the evidence, set aside the search warrant, and dismissed the charges.

The accused then appealed to the Supreme Court of Canada. Six justices agreed that the accused had neither a reasonable expectation of territorial privacy with respect to where the garbage bags were stored thereon nor a reasonable expectation of informational privacy with respect to the garbage bags and the information stored therein. The accused dealt with the items in such a way that he forfeited any reasonable (objective) expectation of keeping its contents confidential.

Justice Binnie, writing the judgment for the six member majority of the Supreme Court, cited several cases where looking through garbage provided important evidence probative at trial, including:

- documents related to a murder found in garbage bags left out front of an apartment building and commingled with other residents' bags;
- a burned baseball bat used to beat a person to death found in a dumpster located on a residential property;

- cans, cups and straws tossed into garbage bins and onto the ground in the public domain from which DNA has been extracted;
- a deceased's gloves found in garbage behind a residential address;
- a body placed in a commercial dumpster and later located in a landfill site;
- a sweatshirt found in the garbage close to the scenes of a murder and sexual assaults that contained important DNA evidence;
- a tissue left in a garbage pail in a motel room that the accused had checked out of; and
- boxes found in a garbage pail in a common laundry room adjacent to an accused's suite that connected the accused to a robbery.

Abandonment

A person who abandons an item ceases to have a reasonable expectation of privacy with regard to it:

> The concept of abandonment is about whether a presumed subjective privacy interest of the householder in trash put out for collection is one that an independent and informed observer, viewing the matter objectively, would consider reasonable in the totality of the circumstances having regard firstly to the need to balance "societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement"; secondly, whether an accused has conducted himself in a manner that is inconsistent with the reasonable continued assertion of a privacy interest and, thirdly, the long-term consequences for the due protection of privacy interests in our society. [references omitted, para. 20]

However, whether abandonment occurs is a question of fact. Has the person claiming s.8 *Charter* protection acted "in such a manner as to lead a reasonable and independent observer to conclude that his continued assertion of a privacy interest is unreasonable in the totality of the circumstances?" This totality of the circumstances analysis must be looked at regardless of whether the privacy claim involves personal, territorial, or informational privacy. "Residential waste includes an enormous amount of personal information about what is going on in our homes, including a lot of DNA on household tissues, highly personal records (e.g., love letters, overdue bills and tax returns) and hidden vices (pill bottles, syringes, sexual paraphernalia, etc.)," said Justice Binnie. "A garbage bag may more accurately be described as a bag of 'information' whose contents, viewed in their entirety, paint a fairly accurate and complete picture of the householder's activities and lifestyle. Many of us may not wish to disclose these things to the public generally or to the police in particular."

"Residential waste includes an enormous amount of personal information about what is going on in our homes, including a lot of DNA on household tissues, highly personal records (e.g., love letters, overdue bills and tax returns) and hidden vices (pill bottles, syringes, sexual paraphernalia, etc.). A garbage bag may more accurately be described as a bag of 'information' whose contents, viewed in their entirety, paint a fairly accurate and complete picture of the householder's activities and lifestyle.."

Here, the accused had both an interest in the garbage itself as well as its informational content. And Justice Binnie noted that the issue was not whether he had a "legitimate privacy interest in the concealment of drug paraphernalia, but whether people generally have a privacy interest in the concealed contents of an opaque and sealed 'bag of information'", which he did believe they had.

However, any subjective expectation of privacy the accused may have had was not objectively reasonable in the circumstances. This was not a case of the police grabbing sealed bags as they were unloaded from the accused's vehicle in the back alley to temporarily place them on public property, not yet making their way to the sanctuary of a residential lot. Nor was it a perimeter search. "The long arm of the law" merely reached across the property line to collect the bags of garbage. "I … do not think constitutional protection should turn

"[T]he rural people who take their garbage to a dump and abandon it to the pickers and the seagulls, the apartment dweller who unloads garbage down a chute to the potential scrutiny of a curious building superintendent, and the householder who takes surreptitious advantage of a conveniently located dumpster to rid himself or herself of the "bag of information" are all acting in a manner inconsistent with the reasonable assertion of a continuing privacy interest."

on whether the bags were placed a few inches inside the property line or a few inches outside it," said Justice Binnie. "The point is that the garbage was at the property line, accessible to passers-by. The territorial privacy implicated by the physical intrusion of the police was relatively peripheral and merely considered as part of the totality of circumstances in the informational privacy claim.

The accused intended to abandon his proprietary interest in the physical objects themselves and did not have a reasonable continuing privacy interest in the information which the contents revealed to the police:

> [M]uch garbage never becomes anonymous, e.g. addressed envelopes, personal letters and so on. In this case, the garbage included invoices for the purchase of chemicals used in the preparation of the drug Ecstasy. The idea that s. 8 protects an individuals's privacy in garbage until the last unpaid bill rots into dust, or the incriminating letters turn into muck and are no longer decipherable, is to my mind too extravagant to contemplate. It would require the entire municipal disposal system to be regarded as an extension, in terms of privacy, of the dwelling-house. Yet if there is to be a reasonable cut-off point, where is it to be located? The line must be easily intelligible to both police and homeowners. Logically, because abandonment is a conclusion inferred from the conduct of the individual claiming the s. 8 right, the reasonableness line must relate to the conduct of that individual and not to anything done or not done by the garbage collectors, the police or anyone else involved in the subsequent collection and treatment of the "bag of information".
>
> … Here, I believe, abandonment occurred when the [accused] placed his garbage bags for collection in the open container at the back of his property adjacent to the lot line. He had done everything required of him to commit his rubbish to the municipal collection system. The bags were unprotected and within easy reach of anyone walking by in a public alleyway, including street people, bottle pickers, urban foragers, nosey neighbours and mischievous children, not to mention dogs and assorted wildlife, as well as the garbage collectors and the police. This conclusion is in general accord with the jurisprudence. [paras. 54-55]

And further:

> Nevertheless, until the garbage is placed at or within reach of the lot line, the householder retains an element of control over its disposition and cannot be said to have unequivocally abandoned it, particularly if it is placed on a porch or in a garage or within the immediate vicinity of the dwelling where the principles set out in the "perimeter" cases … .
>
> In municipalities (if there are any left) where garbage collectors come to the garage or porch and carry the garbage to the street, they are operating under (at least) an implied licence from the householder to come onto the property. The licence does not extend to the police. However, when the garbage is placed at the lot line for collection, I believe the householder has sufficiently abandoned his interest and control to eliminate any objectively reasonable privacy interest.
>
> Given the "totality of the circumstances" test, little would be gained by an essay on different variations of garbage disposal. To take a few common examples, however, the rural people who take their garbage to a dump and abandon it to the pickers and the seagulls, the apartment dweller who unloads garbage down a chute to the potential scrutiny of a curious building superintendent, and the householder who takes surreptitious advantage of a conveniently located

> dumpster to rid himself or herself of the "bag of information" are all acting in a manner inconsistent with the reasonable assertion of a continuing privacy interest, in my view. [references omitted, paras. 62-64]

The Court also rejected the contention that the accused retained an objectively reasonable privacy interest in the contents of the garbage bags until the bags were actually collected by the municipal employees. And the Court did not accept the proposition that private information should remain confidential to the persons it was intended to be divulged (i.e. the garbage collectors), and for the purpose for which it was divulged. "[T]o extend it to the garbage collector/householder relationship, such as it is, is a step too far," said Justice Binnie. "Not only does the garbage collector not undertake to keep the trash confidential, any expectation by a householder of any such undertaking would be plainly unreasonable." Nor did the city bylaw that prohibited scavenging from garbage cans protect his privacy interest:

> ... The fact that a City of Calgary bylaw says that only garbage collectors may collect garbage has little bearing, in my view, on the proper characterization of the [accused's] conduct in discarding to the municipal garbage system articles that proved to be of interest to the police. His conduct was plainly inconsistent with the retention of a privacy interest as, in my view, an independent observer would not regard such an expectation of privacy as reasonable in the totality of the circumstances. [para. 68]

Finally, the accused's "conduct was ... inconsistent with preservation of [privacy] and tipped the balance in favour of the [legitimate demands of law enforcement and criminal investigation]." The police techniques in this case did not undermine privacy nor have the potential to make social life in Canada intolerable. Because the bags were abandoned, there was no subsisting privacy interest at the time the police gathered the bags, even though lifestyle and biographical information was exposed, and therefore there was no violation of his *Charter* rights:

> In summary ... the [accused] had abandoned his privacy interest in the contents of the garbage bags gathered up by the police when he placed them in the garbage alcove open to the laneway ready for collection. The taking by the police did not constitute a search and seizure within the scope of s. 8, and the evidence (as well as the fruits of the search warrant obtained in reliance on such evidence) was properly admissible. [para. 73]

> "[The accused's] initial privacy interest in the evidence was abandoned when he placed the bags for collection as garbage from a stand indented in the back fence of his Calgary home adjacent to a public alleyway, to which any passing member of the public had ready access. The police had no greater access in this regard than the public, but their access was no less. At that point, the [accused] had done everything required to rid himself of the contents including whatever private information was embedded therein, and this conduct ... , was inconsistent with the continued assertion of a constitutionally protected privacy interest."

Since there was no *Charter* breach there was no need to consider the admission or exclusion of the evidence under s.24(2).

A Single Dissent

Justice Abella found that the accused did have a privacy interest in the personal information emanating from his home in the form of household waste and put out for disposal. He was entitled to protection from indiscriminate state intrusion. In her view, there should be at least a reasonable suspicion that a crime has been or is likely to be committed before the police could rummage through his personal information:

> Individuals who put out their household waste as "garbage" expect that it will reach the waste disposal system: nothing more, nothing less. No one would reasonably expect the personal information contained in their household waste

> to be publicly available for random scrutiny by anyone, let alone the state, before it reaches its intended destination. Household waste, it is true, is composed of abandoned items that the occupant of the household may no longer wish to keep in his or her home. In my view, however, it is a further and unwarranted step to conclude that these individuals have abandoned the expectation, reasonable in my view, that the personal information emanating from their home will remain private.
>
> While personal information may be obtained by searching through household waste that is left at or in close proximity to the property line for collection, on the other hand the individual disposing of the waste has indicated an intention to part with the objects contained in it. From a balancing of the Tessling factors, this leads to a conclusion that we are dealing with a diminished expectation of privacy, not unlike the reduced expectation at border crossings ... This does not mean that the state can arbitrarily search through the information. Barring exigent circumstances, there should at least be a threshold of reasonable suspicion about the possibility of a criminal offence before household waste left for collection is searched. ... [paras. 89-90]

In this case, however, Justice Abella concluded the police had ample evidence to support a reasonable suspicion that the accused had committed a crime and were therefore entitled to search the household waste left for disposal. Since there was no *Charter* breach she too would dismiss the appeal.

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

CDSA FORFEITURE PROCEEDINGS ARE INDEPENDENT OF SENTENCING

R. v. Craig, 2009 SCC 23
R. v. Ouellette, 2009 SCC 24
R. v. Nguyen, 2009 SCC 25

In a trilogy of cases involving the offence-related real property forfeiture provisions under the *Controlled Drugs and Substances Act* the Supreme Court of Canada has outlined the following principles:

- Forfeiture orders should be approached independently from the broader sentencing inquiry and a forfeiture order should not be taken into consideration in crafting a fit and proportionate sentence:

  > There is no doubt that forfeiture may be punitive in its impact. ... It does not follow, however, that it should be consolidated with sentencing on a totality approach, especially since it almost inevitably leads to lower terms of imprisonment for offenders with property if one treats the "total" punishment (jail plus forfeiture) as unduly harsh. In other words, people with property might be able to avoid jail or receive reduced custodial terms, while those without property would not.
  >
  > Such a result troubles not only the conscience by inadvertently rewarding offenders with property available for forfeiture and penalizing those without, it offends our bedrock notions of fitness in sentencing since individuals with no property to forfeit are no more blameworthy than those with property. It would be unjust for them to receive more severe custodial terms simply because they have no property to forfeit. [majority at paras. 34-35]

  And:

  > In addition to my concern that those without property should not be treated more harshly than those who have it, I see the purpose and statutory language underlying the forfeiture scheme as a reflection of Parliament's intention that forfeiture orders be treated independently, pursuant to a separate rationale and as a distinct response to distinct circumstances. The sentencing inquiry focuses on the individualized circumstances of the offender; the main focus of forfeiture orders, on the other hand, is on the property itself and its role in past and future crime. [majority at para. 40]

- forfeiture of property is not an all-or-nothing affair and partial forfeiture is available under the *Controlled Drugs and Substances Act*.

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

C.O.N. OFFENCE-RELATED REAL PROPERTY FORFEITURE GRID

Case	Property Description	Offences	Crime Description	Trial Disposition	Appeal Results
Craig	✓ older two level home ✓ 1,000 sq. ft. ✓ accused lived in house	✓ producing marihuana	✓ 186 marihuana plants including clones, packaging, scales, a container with one pound of marihuana packaged for wholesale distribution, additional pre-packed marihuana, & score sheets ✓ basement & portions of main floor devoted to cultivation ✓ three growing rooms & one drying room ✓ industrial lighting, ventilation, & irrigation systems	✓ 12 month conditional sentence ✓ $100,000 fine ✓ ordered to pay a $15,000 victim surcharge ✓ no forfeiture of house Mitigation ✓ no criminal record Aggravation ✓ operation was sizable ✓ operation had been ongoing for a number of years	BCCA upheld conditional sentence but set aside the fine & victim surcharge, instead ordering forfeiture of the house. SCC allowed the appeal and set aside the forfeiture order.
Ouellette	✓ two level home ✓ accused lived in house	✓ producing marihuana ✓ possession for the purpose of trafficking	✓ 129 marihuana plants, scales, & 14 kgs. of marihuana leaves in freezer ✓ grow occupied basement ✓ specialized lighting & ventilation was installed ✓ a gun was found upstairs ✓ building was protected by a makeshift surveillance system ✓ very little of the residence was used for anything but the grow operation	✓ 10 month conditional sentence ✓ one year probation ✓ ordered to pay a $2,000 donation ✓ plus full forfeiture of the house Mitigation ✓ no related criminal record, only an impaired driving conviction ✓ no link to organized crime ✓ had been working for nine years Aggravation ✓ property adapted primarily for marihuana production ✓ profit motive ✓ possession of a gun	QueCA allowed the appeal & only ordered partial (half) forfeiture of the house. SCC upheld the forfeiture order & dismissed the appeal.
Nguyen	✓ three level home ✓ accused were married couple living elsewhere ✓ 18 year old daughter lived at the house	✓ producing marihuana ✓ possession for the purpose of trafficking	✓ 96 marihuana plants ✓ recent harvest & a new crop had been prepared ✓ marihuana clones found in the kitchen refrigerator ✓ two of three upstairs bedrooms used on a transitory basis ✓ front exterior door had a metal bracket and a barricade ✓ windows to basement rooms containing plants was boarded up ✓ lighting, irrigation, & ventilation systems had been installed ✓ air fresheners installed on main floor	✓ 18 month conditional sentence ✓ plus full forfeiture of the residence Mitigation ✓ neither accused had a criminal record ✓ no involvement in organized crime Aggravation ✓ sophistication and commercial nature of the operation ✓ likely house had been purchased solely for growing marihuana	BCCA upheld the forfeiture order. SCC upheld the forfeiture order.

POLICE DUTY TO DISCLOSE CAN INCLUDE DISCIPLINARY FILES

R. v. McNeil, 2009 SCC 3

The accused was arrested by police for an alleged drug transaction. He was subsequently prosecuted and convicted on multiple drug charges, including possession of marijuana and cocaine for the purpose of trafficking. The arresting officer was the Crown's main witness and testified to the reasonable grounds supporting the accused's arrest. Furthermore, the finding that the possession of marijuana and cocaine was for the purpose of trafficking turned on the arresting officer's credibility.

Following his conviction but before sentencing, the accused learned that the arresting officer was engaged in drug-related misconduct that had led to both internal disciplinary proceedings under the provincial *Police Services Act* and to criminal charges. Both were ongoing at the time. The accused chose to proceed to sentence and appeal his conviction instead. Although the Ontario Court of Appeal found some of the targeted records met the relevancy threshold required for third party production, it ruled there was no reasonable expectation of privacy in the criminal investigation files related to the charges against the arresting officer and ordered the files disclosed, subject to irrelevancy and privilege. As for the police disciplinary records, the court adjourned the motion.

The Ontario Attorney General was granted leave to appeal to the Supreme Court of Canada and the production order was stayed pending disposition of the appeal. The arresting officer subsequently pled guilty to one of the criminal charges brought against him and the accused's convictions were set aside by the Ontario Court of Appeal. The Crown did not re-prosecute the accused and he withdrew his participation in the appeal, but the Supreme Court agreed to hear the case anyways.

In an unanimous judgment the Supreme Court allowed the appeal and set aside the Ontario high court order. The Court also explained the respective obligations of the Crown and the police to disclose the fruits of an investigation to an accused.

First Party Disclosure Regime (Stinchcombe)

Under disclosure law, the Crown must disclose all relevant evidence in their possession to an accused person. "The Crown's obligation to disclose all relevant information in its possession to an accused is well established at common law and is now constitutionally entrenched in the right to full answer and defence under s. 7 of the Canadian Charter," said the Court. The Supreme Court described the Crown's duty to disclose as follows:

Onus on the Crown to justify non-disclosure.

> The Crown's obligation to disclose all relevant information in its possession relating to the investigation against an accused is well established. The duty is triggered upon request and does not require an application to the court. ... [R]elevant information in the first party production context includes not only information related to those matters the Crown intends to adduce in evidence against the accused, but also any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence ... . The Crown's obligation survives the trial and, in the appellate context, the scope of relevant information therefore includes any information in respect of which there is a reasonable possibility that it may assist the appellant in prosecuting an appeal.
>
> While the Stinchcombe automatic disclosure obligation is not absolute, it admits of few exceptions. Unless the information is clearly irrelevant, privileged, or its disclosure is otherwise governed by law, the Crown must disclose to the accused all material in its possession. The Crown retains discretion as to the manner and timing of disclosure where the circumstances are such that disclosure in the usual course may result in harm to anyone or prejudice to the public interest. The Crown's exercise of discretion in fulfilling its obligation to disclose is reviewable by a court.
>
> ... [T]he Crown's obligation under Stinchcombe to disclose the fruits of the investigation does not signify that no residual privacy interest can exist in the contents of the Crown's file. It should come as no surprise that any number of persons and

> entities may have a residual privacy interest in material gathered in the course of a criminal investigation. Criminal investigative files may contain highly sensitive material including: outlines of unproven allegations; statements of complainants or witnesses — at times concerning very personal matters; personal addresses and phone numbers; photographs; medical reports; bank statements; search warrant information; surveillance reports; communications intercepted by wiretap; scientific evidence including DNA information; criminal records, etc. The privacy legislation of all 10 provinces addresses the disclosure of information contained in law enforcement files. ... [paras. 17-19]

"The law cannot impose an obligation on the Crown to disclose material which it does not have or cannot obtain."

The prosecuting Crown must disclose material in its possession that is relevant to the accused's case and the the onus is on the Crown to justify the non-disclosure of any material in its possession. This first party regime of disclosure extends only to material in the possession or control of the Crown:

> ... The law cannot impose an obligation on the Crown to disclose material which it does not have or cannot obtain. A question then arises as to whether "the Crown", for disclosure purposes, encompasses other state authorities. The notion that all state authorities amount to a single "Crown" entity for the purposes of disclosure and production must be quickly rejected. It finds no support in law and, given our multi-tiered system of governance and the realities of Canada's geography, is unworkable in practice. ... Accordingly, the Stinchcombe disclosure regime only extends to material relating to the accused's case in the possession or control of the prosecuting Crown entity. This material is commonly referred to as the "fruits of the investigation". [references omitted, para. 22]

As part of the Crown's duty to disclose, it also has a duty to make some inquiries. Although it does not have to inquire whether every department of the provincial or federal government or every police force are in possession of material relevant to the accused's case, there is an obligation to make reasonable inquiries of other Crown entities and other third parties, in appropriate cases, with respect to records and information in their possession that may be relevant to the case being prosecuted. The Crown is not always a passive recipient of relevant information with no obligation of its own to seek out and obtain relevant material:

> The Crown is not an ordinary litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice. As such, Crown counsel who is put on notice of the existence of relevant information cannot simply disregard the matter. Unless the notice appears unfounded, Crown counsel will not be able to fully assess the merits of the case and fulfill its duty as an officer of the court without inquiring further and obtaining the information if it is reasonably feasible to do so. ...
>
> The same duty to inquire applies when the Crown is informed of potentially relevant evidence pertaining to the credibility or reliability of the witnesses in a case. ... "[T]he Crown and the defence are not adverse in interest in discovering the existence of an unreliable or unethical police officer" ... [references omitted, paras. 49-50]

In fulfilling its dual role as an officer of the court and an advocate, the Crown can bridge much of the gap between first and third party disclosure.

Third Party Disclosure Regime (O'Connor)

Onus on the accused to show documents are likely relevant.

The common law provides the accused with a mechanism for accessing third party records that fall beyond the reach of the first party disclosure regime. The test for production of third party records involves a two part test:

1. **Likely Relevance Test**: The applicant (person seeking production) must demonstrate that the information contained in the targeted third party record is likely relevant.
   - burden is on person seeking production to show likely relevance;
   - no assumption that information is relevant;

- likely relevance threshold screens fishing expeditions;
- likely relevance threshold is significant burden but not onerous;
- likely relevance means there is a reasonable possibility that the information is likely probative to an issue at trial or the competence of a witness to testify. "An 'issue at trial' here includes not only material issues concerning the unfolding of the events which form the subject matter of the proceedings, but also 'evidence relating to the credibility of witnesses and to the reliability of other evidence in the case'."

2. **Balancing Test**: If the threshold of likely relevance is met, a judge may then order production of the targeted records for inspection by the court to determine whether production should be ordered to an accused. After viewing the records, the court will determine whether, and to what extent, production should be ordered by weighing the positive and negative consequences of production - balancing the competing interests of the third party's privacy interest with the accused's interest in making full answer and defence.

If the claim of likely relevance, upon inspection of the documents, is not borne out and the documents are clearly irrelevant to the trial of the accused then there is no basis for compelling production to the accused and the application can be summarily dismissed. If the claim of likely relevance, upon inspection of the documents, is borne out, the accused's right to make full answer and defence will, subject to a few exceptions, tip the balance in favour of allowing the application for production.

The third party common law production regime is not limited to cases where a third party has an expectation of privacy in the targeted documents, but provides a general mechanism at common law for ordering production of any record beyond the possession or control of the prosecuting Crown. Whether or not the targeted record is subject to a reasonable expectation of privacy is one of the questions that must be determined at the hearing. There can be an expectation of privacy in the contents of a criminal investigation file relating to third party accused or police disciplinary records that are not in the possession or control of the prosecuting Crown. "There can be no assumption that criminal investigation files relating to third party accused persons do not attract an expectation of privacy absent consideration of their particular contents and other relevant factors," said the Court. "The existence of a reasonable expectation of privacy and its impact, if any, on a third party's obligation to produce is always a contextual, fact-based inquiry. Likewise, no blanket ruling can be made in respect of privacy interests in police disciplinary records without regard to their contents."

As well, records in possession of one Crown entity are not in the possession of another. "The notion that all state authorities constitute a single indivisible Crown entity for the purposes of disclosure finds no support in law and, moreover, is unworkable in practice," said the Court "Accordingly, Crown entities other than the prosecuting Crown are third parties under the ... production regime."

Police and Disclosure

The police are not a third party despite being distinct & independent from Crown.

The police play a very key role in disclosure. The police have a corollary duty to disclose to the prosecuting Crown all material pertaining to the investigation of an accused. "The necessary corollary to the Crown's disclosure duty under Stinchcombe is the obligation of police (or other investigating state authority) to disclose to the Crown all material pertaining to its investigation of the accused," said the Court. "For the purposes of fulfilling this corollary obligation, the investigating police force, although distinct and independent from the Crown at law, is not a third party.

"The necessary corollary to the Crown's disclosure duty ... is the obligation of police ... to disclose to the Crown all material pertaining to its investigation of the accused."

Rather, it acts on the same first party footing as the Crown." The Court continued:

> Under our Canadian system of law enforcement, the general duty to investigate crime falls on the police, not the Crown. The fruits of the investigation against an accused person, therefore, will generally have been gathered, and any resulting criminal charge laid, by the police. While the roles of the Crown and the police are separate and distinct, the police have a duty to participate in prosecutions ... . Of particular relevance here is the police's duty to participate in the disclosure process. The means by which the Crown comes to be in possession of the fruits of the investigation lies in the corollary duty of police investigators to disclose to the Crown all relevant material in their possession. The police's obligation to disclose all material pertaining to the investigation of an accused to the prosecuting Crown was recognized long before Stinchcombe. ...
>
> The corollary duty of the police to disclose to the Crown the fruits of the investigation is now well recognized in the appellate jurisprudence. ... It is also widely acknowledged that the Crown cannot explain a failure to disclose relevant material on the basis that the investigating police force failed to disclose it to the Crown. ...
>
> Even though, in this narrow sense, the police and the Crown may be viewed as one entity for disclosure purposes, the two are unquestionably separate and independent entities, both in fact and in law. Hence, production of criminal investigation files involving third parties, and that of police disciplinary records, usually falls to be determined in the context of an O'Connor application. This is unsurprising because information about third party accused or police misconduct is not likely to make its way into the Crown's Stinchcombe disclosure package unless such information is in some way related to the accused's case.... [references omitted, paras. 23-25]

"The corollary duty of the police to disclose to the Crown the fruits of the investigation is now well recognized ... . It is also widely acknowledged that the Crown cannot explain a failure to disclose relevant material on the basis that the investigating police force failed to disclose it to the Crown."

Disclosing Police Misconduct Information

Although an "accused has no right to automatic disclosure of every aspect of a police officer's employment history or to police disciplinary matters with no realistic bearing on the case against him or her," information of misconduct by a police officer involved in a case against an accused should form part of the first party disclosure package provided to Crown if it is relevant:

> ... [R]ecords relating to findings of serious misconduct by police officers involved in the investigation against the accused properly fall within the scope of the "first party" disclosure package due to the Crown, where the police misconduct is either related to the investigation, or the finding of misconduct could reasonably impact on the case against the accused. The Crown, in turn, must provide disclosure to the accused in accordance with its obligations under Stinchcombe. Production of disciplinary records and criminal investigation files in the possession of the police that do not fall within the scope of this first party disclosure package is governed by the...regime for third party production. [para. 15]

And:

> When the police misconduct in question concerns the same incident that forms the subject-matter of the charge against the accused, the police duty to disclose information concerning police disciplinary action taken in respect of that misconduct is rather self-evident. To state an obvious example, if a police officer is charged under the applicable provincial legislation for excessive use of force in relation to the accused's arrest, this information must be disclosed to the Crown. Where the misconduct of a police witness is not directly related to the investigation against the accused, it may nonetheless be relevant to the accused's case, in which case it should also be disclosed. For example, no one would question that the criminal record for perjury of a civilian material witness would be of relevance to the accused and should form part of the first party disclosure

package. In the same way, findings of police misconduct by a police officer involved in the case against the accused that may have a bearing on the case against an accused should be disclosed. [para. 54]

And further:

[I]t is "neither efficient nor justified" to leave the entire question of access to police misconduct records to be determined in the context of the ... regime for third party production. Indeed ... the disclosure of relevant material, whether it be for or against an accused, is part of the police corollary duty to participate in the disclosure process. Where the information is obviously relevant to the accused's case, it should form part of the first party disclosure package to the Crown without prompting. For example, ... if an officer comes under investigation for serious drug-related misconduct, it becomes incumbent upon the police force, in fulfilment of its corollary duty of disclosure to the Crown, to look into those criminal cases in which the officer is involved and to take appropriate action. Of course, not every finding of police misconduct by an officer involved in the investigation will be of relevance to an accused's case. The officer may have played a peripheral role in the investigation, or the misconduct in question may have no realistic bearing on the credibility or reliability of the officer's evidence. ...

With respect to records concerning police disciplinary matters that do not fall within the scope of first party disclosure obligations, procedures ... tailored to suit the particular needs of the community in which they are implemented, can go a long way towards ensuring a more efficient streamlining of ... applications for third party production. Trial courts seized with motions for disclosure under Stinchcombe or applications for third party production are well placed to make appropriate orders to foster the necessary cooperation between police, the Crown and defence counsel. [references omitted, paras. 59-60]

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

2009 Abbotsford Police Challenge Run
Saturday September 19, 2009

The Abbotsford Police Challenge Run started in 1990 to raise funds for BC Special Olympics. Since its inception, the number of participants and sponsors has increased to the point where the Abbotsford Police Challenge has become the premier event of its kind in the Fraser Valley. The Abbotsford Police Challenge is committed to being a family oriented event and for those who don't run there is a 5 kilometer fun run/walk route so no one is excluded from participating. It is now one of the leading community fundraisers for the BC Special Olympics, ALS Society and The United Way.

EVENTS

10K Challenge and 5K Fun Run

Walkers, runners, wheelchairs and strollers welcome!

LOCATION

Civic Plaza, next to the Abbotsford Police Department 2838 Justice Way, Abbotsford, BC

RACE TIME

Both events start at 9am

Warm-up led by Apollo Athletic Club at 8:30am at Civic Plaza

INFORMATION

Abbotsford Police Department

Phone: 604-859-5225 or 1-800-898-6111

Ask for the Challenge Run local or visit our website at:

www.abbypd.ca