JIBC

IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

INTERROGATION TRILOGY RELEASED

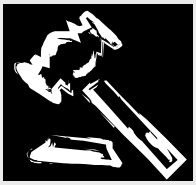
The Supreme Court of Canada, in what is being called an interrogation trilogy, released three companion cases which now help define the limits on the right to counsel found in s. 10(b) of the *Charter*. Questions to be decided included whether a detainee has a constitutional right to further consultations with counsel during the course of an interrogation or whether the right to counsel is spent at the outset, upon an initial consultation with a lawyer. As well, the Court also needed to decide whether a detainee has the right to the presence of lawyer, on their request, during a custodial interrogation and to what extent police must hold off questioning until a detainee has had an opportunity to consult with counsel of their choice. See pages 24 to 30 for a summary of these important cases.

POLICE LEADERSHIP 2011

Did you know that comedian Ron James will be the featured entertainment during the Police Leadership 2011 Conference banquet? Check out pages 18-20 for more details.

LEGALLY SPEAKING:

Reasonable Grounds



"Drinking and driving prosecutions involve a continuum of findings, beginning with a reasonable suspicion the driver has alcohol in his or her body. ... At the other end of the continuum, is the standard for conviction, proof beyond a reasonable doubt that the operator's ability to operate a motor vehicle was impaired by the consumption of alcohol or that the driver's blood alcohol concentration was over the legal limit. Between suspicion and proof beyond a reasonable doubt lies reasonable and probable grounds. ... Reasonable and probable grounds does not amount to proof beyond a reasonable doubt or to a prima face case.– Ontario Court of Appeal Justice Durno in *R. v. Bush*, 2010 ONCA 554 at paras. 36-37.

Read more on page 5.

"Handguns and drug deals are frequent companions, but not good friends. Rip-offs happen. Shootings do to. *Caveat emptor*. *Caveat venditor*. People get hurt. People get killed. Sometimes, the buyer. Other times, the seller."

Ontario Court of Appeal Justice Watt in *R. v. Simon*, 2010 ONCA 754 at para. 1.

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

Note-able Quote

"Police must make choices, wrenching choices, with little time to consult or reflect before they are taken. They are heavily criticized when they are wrong. They are frequently criticized even when they are legally correct but hindsight and fresh facts suggest alternatives to force or arrest." - Alberta Court of Appeal Justice McClung, *R. v. Kephart* (1998), 44 C.C.C. (3d) 97 (Alta.C.A.)

JUSTICE INSTITUTE of BRITISH COLUMBIA LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

The Justice Institute of British Columbia Library is an excellent resource for learning. Here is a list of it's most recent acquisitions which may be of interest to police.

Assessing learning: standards, principles, and procedures.

Morry Fiddler, Catherine Marienau, Urban Whitaker; with a foreword by David O. Justice.

Dubuque, Iowa : Kendall/Hunt Pub., c2006.

LB 2822.75 F53 2006

ASTD handbook for measuring and evaluating training.

Patricia Pulliam Phillips, editor.

Alexandria, VA: American Society for Training & Development, 2010.

HF 5549.5 T7 A869 2010

Becoming a leader the Annapolis way: 12 combat lessons from the Navy's leadership laboratory.

W. Brad Johnson, Gregory P. Harper.

New York : McGraw-Hill, c2005.

HD 57.7 J647 2005

The bully at work: what you can do to stop the hurt and reclaim your dignity on the job.

Gary Namie and Ruth Namie.

Naperville, Ill. : Sourcebooks, Inc., c2009.

HF 5549.5 E43 N348 2009

The Canadian justice system: an overview.

Paul Atkinson.

Markham, ON : LexisNexis Canada, 2010.

KE 444 A85 2010

The Center for Creative Leadership handbook of leadership development.

Ellen Van Velsor, Cynthia D. McCauley, Marian N. Ruderman, editors; foreword by John R. Ryan.

San Francisco : Jossey-Bass, 2010.

HD 57 C38 2010

Change management and strategic planning. [videorecording]

Roberta Katz;

production services provided by Stanford Video ; director, Danny Zemanek.

[Stanford, Calif.]: Stanford Video; Mill Valley, CA: Kantola Productions; Toronto, ON : Kinetic Video [distributor], c2006.

1 videodisc (47 min.) : sd., col. ; 4 3/4 in.

Presented in the lecture series: Stanford breakfast briefings.

Taped live January 11, 2006, at Stanford University.

Roberta Katz, Associate Vice President, Strategic Planning, at Stanford University, presents six principles for the effective implementation of a strategic plan, provides examples of each, and discusses current efforts within Stanford University that provide a model for organizational change.

HD 30.28 C52 2006 D1039

A coach's guide to developing exemplary leaders: making the most of the leadership challenge and the leadership practices inventory (LPI).

James M. Kouzes and Barry Z. Posner with Elaine Biech.

San Francisco: Pfieffer, 2010.

HD 30.4 K68 2010

Generations, Inc.: from boomers to linksters - managing the friction between generations at work.

Meagan Johnson and Larry Johnson.

New York: AMACOM, c2010.

HF 5549.5 M5 J65 2010

Handling difficult people and situations: lead people through adversity.

by Rick Conlow, Doug Watsabaugh.

[Rochester, NY] : Axzo Press, 2009.

HD 42 C655 2009

How to recognize & reward employees: 150 ways to inspire peak performance.

Donna Deeprose.

New York : AMACOM, c2007.

HF 5549.5 I5 D43 2007

How to succeed at an assessment centre: essential preparation for psychometric tests, group and role-play exercises, panel interviews and presentations.

Harry Tolley, Robert Wood.

London ; Philadelphia, PA : Kogan Page, 2010.

HF 5549.5 E5 T65 2010

How to survive the end of the world as we know it: tactics, techniques, and technologies for uncertain times.

James Wesley Rawles.

New York, N.Y. : Plume/Penguin Group, c2009.

The ultimate guide to total preparedness and self-reliance, this work, written by one of the best-known survival experts, contains everything people need to know in order to prepare and protect themselves.

GF 86 R39 2009

The human brain book.

Rita Carter ... [et al.] ; consultants, Chris Frith, Uta Frith, and Melanie Shulman.

London ; New York, N.Y. : DK Pub., c2009.

RC 386.6 B7 C37 2009

If only I'd said that: Volume V.

Peter Legge.

Burnaby, B.C. : Eaglet Publishing, c2009.

BF 637 S8 L445 2009

Leading across boundaries: creating collaborative agencies in a networked world

Russell M. Linden.

San Francisco, CA : Jossey-Bass, c2010.

HD 30.3 L547 2010

The mindfulness solution: everyday practices for everyday problems.

Ronald D. Siegel.

New York : Guilford Press, c2010.

BF 637 M4 S54 2010

A mindfulness-based stress reduction workbook.

Bob Stahl, Elisha Goldstein.

Oakland, CA: New Harbinger Publications, c2010.

RA 785 S73 2010

Short pants to striped trousers: the life and times of a judge in skid road Vancouver.

Wallace Gilby Craig.

Vancouver, B.C. : W.G. Craig, c2003.

KE 416 C73 A3 2003

Statistics workbook for dummies.

Deborah Rumsey.

Hoboken, N.J. : Wiley, c2005.

HA 29 R842 2005

Stop bullying at work: strategies and tools for HR & legal professionals.

Teresa A. Daniel.

Alexandria, Va.: Society for Human Resource Management, c2009.

HF 5549.5 E43 D36 2009

The stress effect: why smart leaders make dumb decisions - and what to do about it.

by Henry L. Thompson.

San Francisco, Calif.: Jossey-Bass;

Chichester: John Wiley [distributor], c2010.

HD 30.23 T468 2010

Think again: why good leaders make bad decisions and how to keep it from happening to you.

Sydney Finkelstein, Jo Whitehead, and Andrew Campbell.

Boston, Mass.: Harvard Business Press, c2008.

HD 30.23 F555 2008

Understanding girl bullying and what to do about it : strategies to help heal the divide.

Julaine E. Field ... [et al.].

Thousand Oaks, Calif. : Corwin Press, c2009.

From the Publisher: Girl bullying-or relational aggression-is a very real and pervasive problem in today's schools, and studies indicate that bullying between girls can be more covert than between

boys, thus making it more difficult for school professionals to detect and address.

LB 3013.32 U63 2009

Virtual training basics.

Cindy Huggett.

Alexandria, Va. : ASTD Press ; London : Eurospan [distributor], 2010.

HF 5549.5 T7 H84 2010

Volunteer administration: professional practice.

Council for Certification in Volunteer Administration.

Markham, Ont. : LexisNexis Canada, 2010.

HN 49 V64 V636 2010

CONSUMPTION PLUS UNEXPLAINED ACCIDENT MAY PROVIDE REASONABLE GROUNDS

R. v. Bush, 2010 ONCA 554

Shortly after midnight the police received a call about an erratic driver believed to be impaired. The caller, who remained on the phone with a dispatcher, followed the driver. He swerved towards the curb, bounced off it and drove up onto it, narrowly missing a light post. The citizen had tried numerous times to get the accused's attention by flashing his headlights but it proved fruitless. Before police arrived the accused's vehicle rear ended a truck parked at the roadside in a well lit residential neighbourhood. The truck was forced across other lanes of traffic and into a light pole, snapping off its rear axle. The dispatcher advised responding officers that a civilian reported erratic driving and believed the driver was intoxicated. Within about a minute of arriving on scene, and without asking the accused if he had been drinking or how the accident happened, the officer arrested him for impaired operation and made an Intoxilyzer demand. The accused had a dazed look on his face, his eyes were red and glassy, he was swaying back and forth while standing, and he had an odour of alcohol on his breath. The accused subsequently provided breath samples over the legal limit.

At trial in the Ontario Court of Justice the officer said made the arrest and demand as a result of his observations of the accused, the information he received from the dispatcher, and the circumstances of the accident itself. The roads were clear and dry, the truck was moved on impact, and the airbags had been deployed. He believed the accused's ability to operate a motor vehicle was impaired by alcohol. But the officer acknowledged he had no grounds to believe the accused was impaired only on the basis of what the dispatcher had told him. He also agreed that it was not unusual for the airbag powder to get into a person's eyes, causing them to become red and watery.

The accused argued, in part, that the arresting officer objectively lacked reasonable and probable grounds to arrest and make a breath demand. However, the trial judge found the arresting officer was entitled to rely on the civilian's opinion regarding the driver's intoxication and was not required to obtain confirmatory evidence before acting on it. The civilian observed the erratic driving, called police, and followed the car. Looking at the grounds collectively and not individually, the judge found reasonable and probable grounds existed. She concluded it was "not an exercise in building blocks where the incriminatory grounds lose value in the face of the absence of certain other usual grounds." An explanation for one indicator of impairment such as red and glassy eyes did not render the officer's observations unreliable. Nor was it necessary for the officer to have given an approved screening device test before arresting the accused. The accused was convicted of both impaired driving and over 80mg%, with the over 80mg% count conditionally stayed. He received a $700 fine and a 12 month driving prohibition.

The accused's appeal to the Ontario Superior Court of Justice was successful. The appeal judge noted the arrest was made within a minute of the officer's arrival and no further enquiries were made of either the accused or the civilian witness. "It may be that the officer thought that alcoholic breath plus an accident equals impaired by alcohol," said the appeal judge. He was not satisfied that the trial judge assessed the totality of the surrounding circumstances in determining if the officer had

reasonable and probable grounds. The conviction appeal was allowed and a new trial was ordered.

"Reasonable and probable grounds does not amount to proof beyond a reasonable doubt or to a prima face case."

The Crown then appealed to the Ontario Court of Appeal submitting, in part, that the appeal judge erred by endorsing an approach to reasonable and probable grounds that excluded from consideration any indicia of impairment which could be attributed to another cause and required officers to conduct interviews before determining if reasonable and probable grounds exist. The accused, on the other hand, argued that the reasonable and probable grounds issue was entirely fact-driven and that the trial judge erred in finding reasonable and probable grounds existed.

Reasonable and Probable Grounds

Justice Durno, speaking for the unanimous Ontario Court of Appeal, held the the trial judge applied both the proper standard of proof and appropriately took into consideration the context in which the demand was made in analyzing the reasonable and probable grounds standard in drinking and driving cases. He stated:

> Drinking and driving prosecutions involve a continuum of findings, beginning with a reasonable suspicion the driver has alcohol in his or her body, the standard for an Approved Screening Device (roadside) demand pursuant to s. 254(2) of the Criminal Code. At the other end of the continuum, is the standard for conviction, proof beyond a reasonable doubt that the operator's ability to operate a motor vehicle was impaired by the consumption of alcohol or that the driver's blood alcohol concentration was over the legal limit.
>
> Between suspicion and proof beyond a reasonable doubt lies reasonable and probable grounds. Section 254(3) of the Criminal Code authorizes peace officers to demand Intoxilyzer breath samples provided the officer "has reasonable and probable grounds to believe that a person is committing or at any time within the preceding three hours has committed" the offence of impaired operation or driving 'over 80.' … Reasonable and probable grounds does not amount to proof beyond a reasonable doubt or to a prima face case.
>
> Reasonable and probable grounds have both a subjective and an objective component. The subjective component requires the officer to have an honest belief the suspect committed the offence. The officer's belief must be supported by objective facts. The objective component is satisfied when a reasonable person placed in the position of the officer would be able to conclude that there were indeed reasonable and probable grounds for the arrest. [references omitted, paras. 36-38]

And further:

> In the context of a breath demand, the reasonable and probable grounds standard is not an onerous test. It must not be inflated to the context of testing trial evidence. Neither must it be so diluted as to threaten individual freedom.
>
> There is no necessity that the defendant be in a state of extreme intoxication before the officer has reasonable and probable grounds to arrest. Impairment may be established where the prosecution proves any degree of impairment from slight to great. Slight impairment to drive relates to a reduced ability in some measure to perform a complex motor function whether impacting on perception or field of vision, reaction or response time, judgment, and regard for the rules of the road.
>
> The test is whether, objectively, there were reasonable and probable grounds to believe the suspect's ability to drive was even slightly impaired by the consumption of alcohol. … [references omitted, paras. 46-48]

The trial judge considered all of the circumstances and did not err in considering indicia of impairment for which there could have been other explanations resulting from the accident. Contrary to the Superior Court judge's ruling, the accident did not muddy the waters and the trial judge did not fail to assess all of the surrounding circumstances:

Whether reasonable and probable grounds exist is a fact-based exercise dependent upon all the circumstances of the case. The totality of the circumstances must be considered. That an accident occurred, including the circumstances under which it occurred and the possible effects of it, must be taken into account by the officer along with the other evidence in determining whether there are reasonable and probable grounds to arrest for impaired driving. Consumption plus an unexplained accident may generate reasonable and probable grounds although that may not always be the case.

In assessing whether reasonable and probable grounds existed, trial judges are often improperly asked to engage in a dissection of the officer's grounds looking at each in isolation, opinions that were developed at the scene "without the luxury of judicial reflection". However, it is neither necessary nor desirable to conduct an impaired driving trial as a threshold exercise in determining whether the officer's belief was reasonable.

An assessment of whether the officer objectively had reasonable and probable grounds does not involve the equivalent of an impaired driver scorecard with the list of all the usual indicia of impairment and counsel noting which ones are present and which are absent as the essential test. There is no mathematical formula with a certain number of indicia being required before reasonable and probable grounds objectively existed. The absence of some indicia that are often found in impaired drivers does not necessarily undermine a finding of reasonable and probable grounds based on the observed indicia and available information.

Consideration of the totality of the circumstances includes the existence of an accident. However, that the accident could have caused some of the indicia relied upon when they could also have been caused by the consumption of alcohol does not mean the officer has to totally eliminate those indicia from consideration. They have to be considered along with all the other indicia in light of the fact there may be another explanation. … [references omitted, paras. 54-57]

"A trained police officer is entitled to draw inferences and make deductions drawing on experience."

In this case, the trial judge appropriately considered that the arresting officer took the accident into consideration in determining whether reasonable and probable grounds objectively existed. The fact that "there might be another explanation for some of the factors the officer properly took into account in forming his opinion of impairment to drive did not eliminate the indicia or render them unreliable," said Justice Durno.

The Court of Appeal also rejected the accused's argument that the officer rushed to justice by arresting him within a minute or less of arriving at the scene without doing more investigation, such as making a roadside breath demand, asking the accused if he had been drinking, or asking him and other witnesses at the scene how the accident happened:

> There is no minimum time period nor mandatory questioning that must occur before an officer can objectively have reasonable and probable grounds. There is no requirement that a roadside sample be taken. The ASD provides evidence of the blood alcohol concentration in the suspect's blood, not evidence of impairment. The trial judge correctly found that if the officer subjectively and objectively had reasonable and probable grounds that withstand judicial scrutiny, the failure to invoke the roadside screening provisions was irrelevant. If the officer's belief failed to meet the requisite standard, there was a s. 8 Charter violation.
>
> A trained police officer is entitled to draw inferences and make deductions drawing on experience. Here, the investigating officer had 18 years' experience. The trial judge was entitled to take into consideration that experience and training in assessing whether he objectively had reasonable and probable grounds. In addition, in determining whether reasonable and probable grounds exist, the officer is entitled to rely on hearsay. [references omitted, paras. 60-61]

And further:

> In making his or her determination, the officer is not required to accept every explanation or statement provided by the suspect. That the officer turned out to be under a misapprehension is not determinative. The important fact is not whether the officer's belief was accurate. It is whether it was reasonable at the time of the arrest. That the conclusion was drawn from hearsay, incomplete sources, or contained assumptions will not result in its rejection based on facts that emerge later. What must be assessed are the facts as understood by the peace officer when the belief was formed.
>
> An officer is required to assess the situation and competently conduct the investigation he or she feels appropriate to determine if reasonable and probable grounds exist. In some cases, that might include interviewing witnesses and/or the suspect if necessary. In others, the officer's observations and information known at the time may readily establish the requisite grounds. [references omitted, paras. 66-67]

Although the officer could have asked the accused if he had consumed alcohol, the weight to be attached to the answer would have been for the officer to determine. "If he said he had one beer or nothing to drink, the officer was not required to accept what he was told and terminate the investigation," said Justice Durno:

> The officer could have asked the [accused] how the accident occurred. However, if he provided an explanation unrelated to intoxication, the officer was not required to accept the explanation and eliminate the accident from consideration. At trial, the [accused] admitted that he hit the curb because he was making cell phone calls and looking up numbers as he drove. His cell phone records confirmed he made six calls to his girlfriend which were continually disconnecting within five minutes of the accident. Continuing to make telephone calls while driving into curbs could also be seen as a sign of impairment.
>
> The issue is not whether the officer could have conducted a more thorough investigation. The issue is whether, when the officer made the breath demand, he subjectively and objectively had reasonable and probable grounds to do so. That the belief was formed in less than one minute is not determinative. That an opinion of impairment of the ability to operate a motor vehicle can be made in under a minute is neither surprising nor unusual.
>
> Here, the officer could rely on the report of erratic driving that appeared to be consistent with the driver being intoxicated, that the driver had struck a truck the officer knew was parked at the extreme side of the road with ample space for cars to pass, propelling the truck to the other side of the road, that the [accused] had the odour of alcohol on his breath, bloodshot eyes, and was swaying. Finally, when the officer asked the [accused] if he was okay he said that he was. [references omitted, paras. 69-71]

The Ontario Court of Appeal concluded that the trial judge considered the appropriate factors and correctly found the officer objectively had reasonable and probable grounds. The accused's appeal was allowed and his conviction and sentence were restored.

Complete case available at www.ontariocourts.on.ca

THREE JUDGES, THREE DIFFERENT OPINIONS ON LEGALITY OF ARREST

R. v. Loewen, 2010 ABCA 255

After stopping the accused for speeding, an officer noticed the smell of freshly burnt marijuana coming from the vehicle and saw a duffle bag on the back seat. The accused identified himself verbally by name but could not produce a driver's licence. The officer invited him to move into the police vehicle to check his identity. But before getting in, the officer patted the accused down for officer safety reasons, discovering $5,410 in cash. The accused then admitted that he misidentified himself and a new name was provided. After issuing a speeding ticket under the second name, the officer arrested him for possessing a controlled substance and indicated he was going to search the vehicle. The officer found

100 grams of cocaine in the vehicle and the accused then provided his real name.

At trial in the Alberta Court of Queen's Bench the Crown noted that possession of less than 30 grams of marijuana was only a summary conviction offence and the officer could not, by smell alone, determine quantity. Therefore, any arrest for that offence would have to be under s. 495(1)(b) of the *Criminal Code* (finds committing). However, the Crown submitted that the large bundle of cash found on the accused implied trafficking, which suggested quantities over 30 grams, justifying an arrest under s. 495(1)(a) (on reasonable grounds). The accused, on the other hand, contended that the officer did not see any marijuana and therefore did not "find" him committing an offence as required by s. 495(1)(b). The smell could not amount to "finding" an offence being committed because the smell of burnt marijuana did not give sufficient grounds for arrest, since burnt marijuana was at best indicative of past possession, not present possession. The trial judge agreed with the Crown and found the officer had reasonable grounds to arrest the accused under s. 495(1)(a) and the search that followed was reasonable. "What the cash adds to the smell is an indication of buying or selling of drugs in a relatively large quantity," said the judge. "That brings this arrest under Section 495(1)(a)." There were no *Charter* breaches and, even if there were, the evidence would have been admitted. The accused was convicted of possessing a controlled substance for the purpose of trafficking.

The accused then challenged his conviction to the Alberta Court of Appeal arguing the evidence against him was obtained from an illegal search that followed an unlawful arrest. But a majority of the Court of Appeal disagreed, albeit for different reasons.

So Say One: s. 495(1)(a) or (b) Applied

Justice Slatter first noted that ss. 495(1)(a) and (2)(e) refer to "reasonable" grounds while ss. 495(1)(c) and (2)(d) refer to "reasonable and probable" grounds. On the other hand s. 495(1)(b) does not refer to any "grounds", but requires the officer "find" the person committing an offence. The test for arrest under s. 495(1)(b) is whether "the peace officer himself finds a situation in which a person is apparently committing an offence". The opinion of the peace officer must be both honestly held and reasonable.

In discussing the reasonable grounds standard, Justice Slatter stated:

> The criminal law has different standards of proof for different issues. A peace officer who has "reasonable grounds to suspect" impaired driving may request a roadside breath sample: Criminal Code, s. 254(2). A peace officer who has "reasonable grounds to believe" impaired driving has occurred can require a breath sample to determine the amount of alcohol in the blood: Criminal Code, s. 254(3). The concept of a standard of proof is generally applied in judicial proceedings when rights are being determined. However, many of these collateral tests, like "reasonable grounds" are applied to non-judicial actors exercising public authority. In this context these concepts are not truly "standards of proof". Because they are intended to impose a standard of conduct on public officials, they do not serve the same purpose as a standard of proof in judicial proceedings. Some of these standards are more commonly used for "threshold" issues that do not finally decide rights, and which often must be decided quickly and on an ex parte basis. [para. 13]

The recognized cases relating to determining reasonable grounds by judicial officers or in quasi-judicial proceedings "do not necessarily set the standard of conduct expected of a police officer on the streets who must make decisions without the luxury of long reflection." He found "reasonable and probable grounds" did not require a "prima facie case" nor mean "more likely than not on a balance of probabilities". Rather, "'reasonable grounds' conveys more the idea of an event not unlikely to occur for reasons that rise above mere suspicion." He cited the following example:

> Many things can reasonably be anticipated to occur, without it being probable that they will occur. In the summer, it is reasonable to anticipate a thunderstorm, even though thunderstorms are not probable, in the sense that thunderstorms do not happen on more days than

> not. But if a thunderstorm occurs, one is not surprised, because that circumstance is not unreasonable. Likewise, if one goes to a shopping mall, it is not unreasonable to expect to see a parent pushing twins in a stroller, even though that event would likely not be observed more frequently than on one-half of all visits, and is therefore not "probable". [para. 17]

"It follows that a belief in the existence of a set of facts can be 'reasonable' even if the existence of those facts is not 'probable'", said Justice Slatter. "In this context 'reasonable' relates to legitimate expectations that a fact exists, without being able to say that it is 'more likely than not'."

Here the officer had the necessary subjective belief that there were controlled substances in the car. Even though he may have been "torn" about whether he would find marijuana, he stated he believed that he would at least find "some other drug". In Justice Slatter's opinion that was a sufficient subjective belief to support the arrest and the search. He also found the officer had objective reasonable grounds for the arrest:

> A pronounced smell of burnt marijuana indicates that marijuana was recently consumed in the vehicle. Two inferences are possible. It could be inferred that the driver of the vehicle consumed all the marijuana, so that the smell is only indicative of past possession, not present possession. On the other hand, it could be inferred that the driver did not consume all the marijuana, kept some for later consumption, and therefore is presently committing the offence of possession of a controlled substance. Neither inference is intuitively more likely than the other, so neither can be said to prevail "on a balance of probabilities". … [H]owever, that is not the test. The test is whether it was "reasonable" for [the officer] to conclude that the [accused] still possessed some marijuana, not whether it was more probable than not that he did.
>
> … … …
>
> Here the context of the arrest includes the nature, freshness and strength of the smell, the large bundle of cash, the giving of a false name, the fact that the [accused] was alone in the car, and the location of the police stop halfway

BY THE BOOK:

Power of Arrest: *Criminal Code*

s.495(1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence,

(b) a person whom he finds committing a criminal offence, or

(c) a person for whose arrest he has reasonable and probable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

(2) A peace officer shall not arrest a person without warrant for

(a) an indictable offence mentioned in section 553,

(b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or

(c) an offence punishable on summary conviction,

in any case where

(d) he has reasonable and probable grounds to believe that the public interest, having regard to all the circumstances including the need to

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence, or

(iii) prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person, and

(e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend in court in order to be dealt with according to law.

between Edson and Edmonton. Some of these facts surrounding the [accused's] arrest were not necessarily sinister. For example, [the officer] agreed that there might have been an innocent explanation for the large bundle of money. But that does not mean that the large bundle of money, folded as it was, was not suspicious. Finding that money, in the context of the other circumstances, contributed to making it reasonable to make the arrest. Further, just because each circumstance, taken alone, was not sufficient to arouse suspicion does not make the arrest unreasonable; all of the circumstances must be considered collectively, not Piecemeal. It is no answer that [the officer] acknowledged that each specific thing that he saw could have had, in isolation, and innocent explanation. [references omitted, paras. 28-30]

> "[J]ust because each circumstance, taken alone, was not sufficient to arouse suspicion does not make the arrest unreasonable; all of the circumstances must be considered collectively, not Piecemeal."

Furthermore, there were reasonable grounds linking the smell of the marijuana to the accused even though he showed no signs of impairment and did not have the smell on his person or his clothing. He was alone in the vehicle and the officer concluded from the smell that the marijuana had been smoked since the vehicle left its starting point, Edson. There was no evidence that anybody else was in the vehicle after it left Edson and any speculation about a possible third party being present did not make the officer's belief unreasonable. The accused was also in possession of an unusually large bundle of cash. These circumstances amounted to reasonable grounds supporting the arrest, and the incidental search:

> It was not necessary for [the officer] to have actual proof, or belief to a virtual certainty, that the [accused] was in possession of marijuana at the time of arrest. The trial judge's finding that "the officer came to the conclusion that the accused was currently in possession of marijuana, and arrested him for this and searched for evidence in a search incident to that arrest" speaks mostly to the officer's subjective belief. To establish objectively reasonable grounds, the Crown needed only to show that it was objectively reasonable to believe that an offence was being committed, not that it was probable or certain. [para. 32]

The smell of burnt marijuana combined with the bundle of cash justified an arrest. It was reasonable for the officer to believe that an offence was being committed, even if that was not necessarily "probable". Even if the circumstances only suggested that less than 30 grams of marijuana was involved, the smell of marijuana, the giving of a false name, and the other circumstances placed the officer in "a situation in which a person is apparently committing an offence". Thus the arrest was lawful under s. 495(1)(a) or (b) of the *Criminal Code*.

Although a warrantless search is presumed to be unlawful, the police have a right to search an arrestee and their immediate surroundings upon arrest. In doing so, the police do not require reasonable grounds to conduct the search; they only need show that what they did was reasonable:

> When [the officer] decided to arrest the [accused] for possession of marijuana he needed only to have a reasonable belief that the [accused] was then committing an offence. To justify the search there only had to be "some reasonable basis for doing what the police officer did", without needing to show it was more probable than not that drugs would be found. …
>
> In this case if there were reasonable grounds to arrest the [accused], to justify the search the Crown need only show that it was reasonable for [the officer] to check for controlled substances. To show that their conduct was reasonable, the

> "A search for evidence "incidental to the arrest" does not become unlawful simply because some other type of contraband is found in the process. So, for example, a valid search for marijuana does not become unlawful simply because another type of drug, or a firearm, is found."

> police must demonstrate that the search was "truly incidental to the arrest" in the sense that there must have been a reasonable prospect of securing evidence "of the offence for which the accused is being arrested". Thus in this case the Crown must show that the arrest was lawful and it was reasonable to look for controlled substances in the car.
>
> A search for evidence "incidental to the arrest" does not become unlawful simply because some other type of contraband is found in the process. So, for example, a valid search for marijuana does not become unlawful simply because another type of drug, or a firearm, is found. The search was still "incidental to the arrest". Once [the officer] arrested the [accused] for possession it was clearly reasonable to search for drugs in the car. The search was lawful and reasonable. [references omitted, paras. 35-37]

The officer had subjective and objective reasonable grounds to believe that the accused was in the possession of a controlled substance. The arrest and search were therefore lawful.

A Second Opinion: s.495(1)(a) Applied

Justice Hunt agreed the accused's appeal should be dismissed, but for different reasons. In her view, the police officer had objectively reasonable grounds for arresting the accused under s. 495(1)(a) and that the subsequent search was justified. If an officer does not have a subjective belief in grounds for arrest the arrest will be unlawful. Here the officer testified several times that he believed he had grounds to arrest for possessing a controlled substance and the accused conceded at trial that this was the case. But the officer said he never saw the accused committing an offence, thus the arrest could not be justified under s. 495(1)(b) (finds committing a criminal offence). Nevertheless, Justice Hunt was satisfied that there was an objective basis to support the officer's subjective belief that he had grounds to arrest the accused under s. 495(1)(a) for possessing a controlled substance in an amount exceeding 30 grams:

> The officer explained clearly why he concluded the marijuana had been smoked within the last two hours, during the time that the vehicle would have travelled between Edson and Wabamun. Since the [accused] was alone in the vehicle when stopped for speeding, it was not an unreasonable conclusion that the [accused] had smoked the marijuana. Even though he did not detect the odour of marijuana on the [accused], the officer could not recall whether he was ever close enough to be able to smell it on him. …He also explained that there was a shield between him and the [accused] while the [accused] was in the back seat of the police vehicle. Thus, his failure to smell marijuana on the [accused] does not detract from the reasonableness of his conclusion that the [accused] had been smoking it in the car.
>
> The officer candidly acknowledged he would not have made the arrest based on odour alone. He made the arrest because of the odour combined with the large bundle of money (nearly $5,500) he found in the [accused's] pocket during a valid pat-down search for reasons of officer safety. Both his evidence, and that of the expert ..., explained in detail why this amount of cash and its denominations (mainly $20 bills) was indicative of drug trafficking. [The expert] testified that most bank machines will only issue a maximum of $500 and average citizens carry only $100 - $200 cash … While the cash was not in $1,000 bundles as is often the norm for street-level traffickers, in the context of the drug trade [the expert] had encountered, on several occasions, a large quantity of cash in various denominations in a single bundle.
>
> The odour and the cash was sufficient to meet the test in Storrey. An objective observer could reasonably conclude that someone who was smoking marijuana in his car and had a large wad of cash in his pocket was involved in the drug trade, and therefore in possession of significant amounts of controlled substances.
>
> Since there were grounds for the arrest, there were also grounds for a search incidental to it. In this regard… [the officer] never wavered from his belief about the presence of controlled substances despite his interchanges with the [accused]. Nothing significant changed in his belief between the arrest and the search. [paras. 47-50]

Even if there was a *Charter* breach Justice Hunt would have admitted the evidence under s.24(2). Any breach was not serious and inadvertent or minor, rather than a wilful or reckless disregard of the *Charter*. Plus the officer had acted in good faith. The impact on the accused's *Charter* rights was not serious, especially since he was driving a third party's car in which he would have little expectation of privacy. Further the truth-seeking function of the criminal trial process would be better served by the admission of the evidence. Refusing to admit the evidence would have a negative impact on the administration of justice. "Front line police officers face an enormously difficult task in trying to stop the flow of illicit drugs," said Justice Hunt. "The law obliges them to deal quickly with possible suspects they have detained. Section 10(a) of the *Charter*, requires that a detainee be advised of the reasons for arrest or detention 'promptly'. That obligation may sometimes detract from the sort of careful analysis about possible *Charter* breaches that can occur later during a trial or an appeal, when there is unlimited time for drawing fine distinctions and examining previous cases."

A Different View: Neither ss.495(1)(a) or (b) Applied

Justice Berger disagreed with his colleagues and found there were no reasonable grounds to arrest the accused for possessing marijuana nor to search his vehicle for "other drugs" that resulted in the seizure of the cocaine. He noted that the officer, with 27 years experience, was no stranger to the criminal courts:

> Given his experience, one would reasonably expect [the officer] to be both well-versed in and mindful of the Charter imperatives governing his investigative actions. He is deemed to know that he has no authority to arrest a citizen on a "hunch" that a crime has been committed. That is not to say that a policeman's intuitive sense, honed over many years of policing, should be ignored as the investigator chooses his or her course of action. There is but one overarching requirement: that course must be lawful and compliant with the Charter. [para. 59]

Here, the officer acknowledged that the smell of burnt marijuana tends to linger and that the most that could be said is that the marijuana had been smoked within several hours of the stop:

> The Crown concedes that in order for the smell of marijuana to be a persuasive factor in assessing grounds for arrest, the arresting officer must convince the court that the odour which he smelled was, indeed, marijuana. Further, that the circumstances surrounding the arrest must indicate present rather than past possession. Of course, the difficulty with olfactory evidence is that the smell of marijuana may indicate nothing more than past possession. In that event, absent an admission, the amount possessed will be unascertainable. Pursuant to s. 495(1)(b) of the Criminal Code, an investigating officer is not entitled to arrest without warrant a person who may have been but is not found in simple possession of marijuana in an amount not exceeding thirty grams, the latter being a summary conviction offence. Past possession of thirty grams or less will not suffice.
>
> At no time did [the officer] testify that he believed that the [accused] was in possession of a controlled substance exceeding 30 grams. Nor could he - after all, he did not find the [accused] in possession of any drug. Moreover, when questioned about the significance of the money, [the officer] said nothing from which it can be reasonably inferred that he suspected trafficking. The factual underpinnings do not support the invocation and application of s. 495(1)(a) of the Criminal Code. [paras. 67-68]

In Justice Berger's view the circumstances of this case, including the smell of burnt marijuana and the cash found in the accused's pocket, did not provide reasonable grounds to arrest for possessing marijuana. The arrest was therefore arbitrary and unlawful. As for the search there was no valid purpose connected to the arrest. He likened the search for other drugs to a search premised upon a hunch or mere intuition or based on the nervousness of the accused:

"[T]he difficulty with olfactory evidence is that the smell of marijuana may indicate nothing more than past possession."

> One can well appreciate [the officer's] desire to find out what was in the duffle bag that he first noticed when he approached the vehicle. Curiosity, even when motivated by an intention to expose criminal conduct, must yield to Charter imperatives. In the instant case, the factual underpinnings do not, in my opinion, establish reasonable grounds to search the vehicle. They do not meet the test of securing evidence of the offence for which the accused was arrested nor for the search for "other drugs" [para. 80]

Justice Berger found neither the arrest nor the search for evidence were valid and the evidence was inadmissible under s. 24(2). He would have allowed the appeal, quashed the accused's conviction, and substituted an acquittal.

Bases on the majority opinions, the accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

JUDICIAL NOTICE ON GENERAL LOCATION OF CELL PHONE OK

R. v. Ranger & Fijalkowski, 2010 ONCA 759

The accuseds, Ranger and Fijalkowski, were convicted of a number of serious offences arising out of a home invasion motivated by the mistaken belief that the home owners were operating a marijuana "grow op" and had a great deal of cash in the home. As part of the Crown's case, business records were entered on consent detailing the operation of various cell phones owned by the accuseds and one of the accomplices, and the cell phone tower to which the signal from a particular phone was transmitted in respect of each call. An Ontario Superior Court judge, without expert evidence, took judicial notice of the approximate location of a cell phone at the time a particular call was made based on the cell phone tower that received the signal. Similarly, he plotted the directional movement of a cell phone over a particular time period by referring to the location of the different cell phone towers that received signals from the cell phone during that time period.

The accuseds appealed, contending, in part, that the trial judge erred in taking judicial notice that certain cell phones were being operated in various geographical locations at different times without hearing expert evidence. But the Ontario Court of Appeal rejected this argument. The trial judge used the cell phone evidence for very limited purposes - to show association among the parties and the approximate geographical location of the cell phones in relation to the cell phone tower that received the transmission. "[The judge] did not take judicial notice that the cell phone was in any precise location, but rather that it could properly be placed in a general location," said the Court of Appeal. "The trial judge's further inference with respect to the movement of the cell phones over a given period of time followed from his determination that judicial notice could be taken of the general location of the cell phone based on the cell phone tower that received a particular transmission." Cell phone users engaged in a cell phone call and travelling from point A to point B will find their cell phone signal passes from one cell phone tower to another at different locations along the route. Thus, the trial judge could take judicial notice that a particular cell phone was in a general location based on the tower that received the signal and the path along which the cell phone was moving could be determined by reference to the cell phone towers that received the signal transmission in respect of particular calls. Plus Crown was seeking to use the cell phone evidence only to show the approximate location of the users and their movement in a certain direction between locations. If, however, the Crown wanted to rely on this kind of evidence for more specific or precise inferences an expert was required.

Complete case available at www.ontariocourts.on.ca

Note-able Quote

"I believe that everyone has within themselves the power to make this a better world." - Lone Ranger

www.10-8.ca

LAWFULLY OBTAINED DNA USEABLE IN SUBSEQUENT UNRELATED INVESTIGATION

R. v. DeJesus, 2010 ONCA 581

Four months after the brutal murder of a woman in an office building, the accused, who had previously worked as a janitor in the building, was charged with her murder. As part of the Crown's case, the police used the accused's DNA which was on file as a result of an earlier, separate police investigation of three sexual assault charges, one of which he pled guilty. This DNA had been found on the accused's underwear which was seized as an incident to lawful arrest. Using this DNA evidence, obtained seven years earlier, the police were able to establish the identity of the killer in this new murder. The semen found on the victim's jeans could not be excluded as coming from the accused; the probability of it coming from someone else was 1 in 670 billion. Furthermore, saliva found on her underwear could not be excluded as coming from the accused; the probability of it coming from someone else was 1 in 65,000. As well, when the accused was arrested he was in possession of a knife, knife sheath, and handcuffs. DNA profiles from the knife sheath and handcuffs matched the victim's DNA. The Ontario Superior Court of Justice found that using the earlier DNA, obtained from the accused's underwear, did not violate s. 8 of the *Charter*. He was convicted by a jury of first degree murder.

The accused then challenged this ruling to the Ontario Court of Appeal, but his appeal was rejected. The Court of Appeal agreed with the trial judge. "Once the [accused] was convicted of sexual assault with a weapon," said the Court, "his privacy with respect to identifying information was significantly diminished." Here, the previous DNA information was obtained as an incident to lawful arrest under the common law. It had been lawfully obtained and retained by the police. And there was no policy reason to prevent the police from using the DNA for comparison purposes in subsequent unrelated investigations, especially where the accused was convicted for the offence under which the DNA was lawfully seized. The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

DOG SNIFF UNLAWFUL: OFFICER LACKED REASONABLE SUSPICION

R. v. Payette, 2010 BCCA 392

The accused, driving alone on a highway, was stopped at a random traffic checkpoint. A qualified dog handler and his drug detecting police service dog were also present at the location. The accused gave his licence and registration to an experienced traffic enforcement officer. Based on the following observations, the officer asked the dog handler to conduct a walk-around sniff search of the vehicle with the dog:

1. The vehicle was a newer model Volvo owned by a third party and accordingly the driver was not the owner of the vehicle;
2. He was the lone occupant in the vehicle;
3. He was unshaven and wearing a dark hoodie.
4. The vehicle, by the debris of water and coffee containers in the vehicle and on the passenger side appeared to be "lived in". There were also food wrappers from Tim Horton to suggest he was hitting "drive through" establishments;
5. He was pale and his head was shaking; and
6. There was a radar detector in the vehicle.

The dog indicated the presence of drugs in the vehicle and the accused was arrested. The car was searched and a suitcase containing 34 one-pound bags of marihuana was found in the trunk.

At trial in British Columbia Provincial Court the judge found the random traffic stop was lawful. It was conducted for traffic safety purposes and not to undertake a drug investigation or for some ulterior purpose. He noted the dog sniff constituted a search and therefore the police required a reasonable suspicion of criminal drug activity before the dog

was deployed. The officer had extensive experience in motor vehicle investigations and his observations supported his decision to for a sniff search of the vehicle. Although none of the observations taken alone would provide a reasonable suspicion for deploying the drug detector dog, when taken together they were sufficient to establish a reasonable suspicion that the accused was involved in drug-related criminal activity. The positive hit by the drug dog then provided reasonable grounds to believe the accused was committing a drug offence and, therefore, his arrest was lawful and the drugs were found during a search conducted incidental to arrest. There was no *Charter* breach under s. 8, the evidence was admitted, and the accused was convicted of possessing marihuana for the purposes of trafficking under s. 5(2) of the *Controlled Drugs and Substances Act*.

> "While ... the objective reasonableness requirement must be viewed in the light of the investigating officer's background and experience, deference to an officer's intuition must not render the objective element of the inquiry meaningless."

The accused then appealed to the British Columbia Court of Appeal. He challenged the trial judge's application of the "reasonable suspicion" standard, rather than "reasonable and probable grounds", in deciding the drug detector dog search at a traffic checkpoint was lawful. Furthermore, he argued that the trial judge erred in determining that the reasonable suspicion standard was even satisfied in this case and, because of this s. 8 *Charter* violation, the evidence should have been excluded under s. 24(2).

Reasonable suspicion v. reasonable & probable grounds

The accused submitted that the reasonable suspicion standard was insufficient to justify the drug dog sniff in this case. Unlike sniff searches at a public bus terminal or a high school that are part of an ongoing criminal investigation, the sniff search occurring here was at a roadside traffic stop involving an arbitrary detention permitted only for the specific purpose of road safety, not for conducting criminal investigations. In his view, a high standard, such as reasonable grounds for belief, was needed. But the Court of Appeal disagreed. "The characteristics of a sniffer dog search … are no different in the context of a roadside traffic stop than in a bus station or school," said Justice Neilson, speaking for the Court of Appeal. "The trial judge properly applied the reasonable suspicion standard in determining whether the drug detector dog was lawfully deployed in this case."

However, the Court of Appeal ruled that the trial judge erred in finding that the standard of reasonable suspicion was satisfied in the circumstances of this case. The standard of reasonable suspicion has both an objective and a subjective component. In assessing the objective component it is the cumulative import or collective effect of the factors that determines whether there is an objectively reasonable basis for the suspicion. These factors must also be viewed in the context of an officer's background and experience in determining whether there were sufficient grounds existing to support a reasonable suspicion. In this case, the standard to be reached was that the officer reasonably suspected the accused was involved in drug-related criminal activity which would then permit a search using a drug detector dog.

But here, the Court of Appeal concluded the six factors relied on by the officer were not capable of providing the required objectively discernible nexus between the accused and illegal drug activity:

> Each of those factors taken on its own is innocuous and characteristic of many citizens driving the highways. [The officer] admitted as much. He conceded the [accused's] beard and the fact he wore a hoodie were not noteworthy. He agreed a driver stopped by the police could be nervous for reasons unrelated to drug activity. He acknowledged that radar detectors are generally and legally used by the public to avoid speeding infractions, but said in his experience drug couriers also use them to keep track of police presence along the highways. He agreed the [accused] was not the only driver who was

> stopped at the road check with food wrappers in his car, but said that, in his experience, those transporting drugs typically obtain food at drive-through restaurants so they do not have to leave their vehicles unattended. He also said his experience led him to believe that people with a record or outstanding charges related to drugs often drive another person's vehicle to avoid raising suspicion on a vehicle check. Nevertheless, vehicles are commonly driven by people other than their owners for a multitude of reasons. [para. 23]

So even though the officer did not rely on each factor individually as the basis for ordering the sniff search, but considered the cumulative picture they presented in the context of his 18 years' experience as a police officer, the six factors taken together were not capable of providing grounds for any objective suspicion of criminal drug activity. "While I appreciate the objective reasonableness requirement must be viewed in the light of the investigating officer's background and experience," said Justice Neilson, "deference to an officer's intuition must not render the objective element of the inquiry meaningless." The Court of Appeal found the officer "ordered the search solely on subjective intuition born of his experience."

Plus the officer testified he did not have sufficient grounds to detain the accused for investigation once the checks on his vehicle and driver's licence were completed. The standard of reasonable suspicion for investigative detention was the same as that for a drug detector dog search in this case. The purpose of further detention or a sniff search would both have been to investigate drug activity. The reasonable suspicion required to justify each would therefore have been identical. The officer's own evidence supported the view that he was uncertain as to whether he had met the standard of reasonable suspicion. Thus, the sniff search was unlawful and breached the accused's rights under s. 8 of the *Charter*.

s.24(2) Charter

Using the revised s. 24(2) analysis the evidence was excluded.

- **the seriousness of the *Charter*-infringing state conduct**. The *Charter* breach did not result from a wilful or flagrant disregard of the accused's rights, but it was not inadvertent either. Its seriousness fell in the mid-range of seriousness.

- **the impact of the breach on the *Charter*-protected interests of the accused**. The accused's privacy interest in the contents of his car while travelling on a public road was lower than the privacy interest attached to his home or office. "Nevertheless, he and the rest of the travelling public have a significant interest in being free to drive on public roads without being subject to unlawful vehicle searches," said Justice Neilson. "This interest is heightened at traffic safety checkpoints, which already amount to arbitrary detentions and are justifiable only because of the public interest in keeping roads safe." The nature of the search, however, was brief and non-intrusive and solely targeted the presence of illegal drugs.

- **society's interest in the adjudication of the case on its merits**. The marihuana seized was highly reliable, real evidence, and essential to the Crown's case. But the unlawful state conduct weighed heavily against exclusion:

  > The public interest in not being subjected to unlawful vehicle searches while arbitrarily detained at roadside stops supports exclusion of the evidence. On the other hand … I am persuaded [the officer's] conduct is mediated somewhat by the fact that at the time of these events there was disagreement as to whether sniff searches constituted a s. 8 search at all…
  >
  > I find this a close call but conclude that admission of the marihuana seized from the [accused's] vehicle in evidence against him would bring the administration of justice into disrepute. [paras. 45-46]

The marihuana was not admissible, the accused's appeal was allowed, and his conviction was set aside.

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

POLICE LEADERSHIP 2011 CONFERENCE

APRIL 11-13, 2011

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. This police leadership conference will provide an opportunity for delegates to hear leadership topics discussed by world-renowned speakers.

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Gordon Scobbie

Assistant Chief Constable, West Midlands Police, UK, Social Media Lead, Association of Chiefs of Police Officers (ACPO) **"UK Policing 2.0. - The Citizen and Digital Engagement"**

Gordon joined Strathclyde Police in 1980, serving operationally in uniform and CID through the ranks, as well as in other areas of the business including Force Personnel, introducing a national performance appraisal system for Scotland and being the first police force in the UK to achieve accreditation for investors in people. He then served for 3 years at the Scottish Police College delivering leadership training before returning to force to establish a disclosure bureau to provide conviction and non conviction information on those wishing to work with children and vulnerable adults.

He then served as an operational Chief Inspector before transferring to West Midlands Police on promotion in October 2004 as Superintendent, Operations Manager at Coventry City Centre . He was then promoted to Commander at Solihull in August 2006 and following completion of the Strategic Command Course he was successful in his application to join West Midlands Police as Assistant Chief Constable. Gordon has been in post since June 2009, holding the Citizen Focus portfolio.

Rex Murphy

Rex Murphy is one of Canada's most respected opinion leaders. His witty intellect and profound insight into issues affecting Canadians are the reasons why they tune in regularly to his weekly CBC radio show, Cross Country Checkup, watch him on CBC TV's The National, and read his column in The National Post. He has a unique ability to examine a topic and articulate it in the most profound yet digestible way. Murphy's audiences become so engaged they don't even realize it's happening.

Cross Country Checkup is Canada's only national open-line radio program, broadcast live across the nation every Sunday afternoon. Each week, Murphy moderates a lively discussion on an issue of national interest or importance and invites listeners to call in with their opinions and thoughts.

Rex Murphy is a stimulating speaker, accomplished storyteller, and knows what makes Canadians tick. His innate ability to speak on a variety of topics makes him a great fit for anyone looking for a fresh and honest perspective on the issues facing them today. Each speech made by Murphy is customized to your topic and audience.

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REGISTRATION

The registration fee for the Police Leadership 2011 Conference is $385 (plus applicable taxes). The registration cut off date is March 21, 2011.

The conference fee includes a reception on Monday evening, lunches on Tuesday and Wednesday, and a banquet dinner on Tuesday. Each participant will receive a "welcome package" upon registration. Register early, as the number of delegates are limited and past conferences have sold out prior to the registration cut-off date.

Banquet Dinner Entertainment

Ron James

Stand-up comedian and host of The Ron James Show on CBC.

One of this country's most popular and treasured comedians, Ron James has been called "more Canadian than warm mitts on a radiator," by Rick Mercer, and "devastatingly funny and clever" by The Globe and Mail. A straight-talking stand up from the East Coast, James has honed his unique brand of intellectual everyman comedy for the past thirty years. In 2009, after a string of hit CBC specials, he launched his own CBC variety show, *The Ron James Show*, which quickly became the network's biggest new comedy show in years.

Prior to hosting his own CBC show, Ron James spent nine years with Second City, and starred in several CBC specials, including *Quest for the West* and *The Road Between My Ears*, which is the CBC's bestselling comedy DVD. His specials routinely draw nearly a million viewers. He's been nominated for a Genie Award, won a Gemini as part of the writing team on *This Hour Has 22 Minutes*, and was voted the inaugural Canadian Comedian of the Year. James was also the only comedian invited to perform when Conan O'Brien brought his Late Night show to Canada.

Simply put, Ron James is one of the funniest, most kinetically charged comedians this country has produced. With rapid-fire jokes and a poet's sensitivity to language, his stand-up sets may be the best gauge going for what it means to be Canadian and what it feels like to live with a unique brand of self-awareness that is shared, coast to coast, by over 30 million people. Razor-sharp, clean, and accessible, James cuts a wide swath through contemporary culture. He draws belly laughs, elicits chin-scratching flashes of insight, and collects rapturous ovations by telling stories from across Canada. Some of the stories are about him; but mostly, they're about us.

Advanced Strategic Communications Seminar

Social Media and Policing in the Digital Age

With the introduction of Social Media networks, how people get information has changed forever. There is no longer a single source of accurate information. People are relying on their peers for information and trusting what they learn online rather than traditional media or corporations. Social media is fast, interactive, unrestricted, and free-wheeling. It has democratized communication. It has also changed policing.

Facebook, Twitter, and YouTube are not only ways to deliver information about the police agency but also an effective investigative tool and key in operational strategies. However, the policing world has to manage the competing interests of security, reputation, privacy, and public interest.

The Advanced Strategic Communications Seminar is a two-day pre-conference workshop that will bring social media pioneers to speak about how to tap into this technology and how to develop social media strategies that can be adapted to the policing environment.

When: April 10-11
Where: Westin Bayshore, Vancouver, BC
Cost: $585 plus HST
Space is limited to 200 participants

Speakers and Topics

Della Smith, Q Workshops Inc.
"Social Media: Promise or Peril"

Tim Burrows, Toronto Police Service
"Media Relations Officer"

Ron "Cook" Barrett, Capitol Region Gang Prevention Center
"Gang Prevention Specialist for NY"

David Toddington, Toddington International Inc.
"Social Media Intelligence Gathering"

Kim Bolan, The Vancouver Sun
"The Real Scoop Blog on Crime"

Assistant Chief Constable Gordon Scobbie
West Midlands Police, UK
"UK Policing 2.0 - The Citizen and Digital Engagement"

Mary Lynn Youn, UBC School of Journalism
"Canada's Media is Changing in a Digital Age"

Chris Gailus, Global TV
"Anchor 6:00 News"

Kyle Friesen, DOJ
"Risks and Pitfalls"

Eric Weaver, DDB Canada Advertising
"Social Marketing: A Profound Cultural Shift"

Delegates are responsible for booking their own rooms. The Westin Bayshore has a block of rooms reserved for the Police Leadership 2011 Conference delegates. Reservations should be made by requesting the "Police Leadership Conference" rate. This room rate is being held until March 17, 2011. Book early as the conference rate can only be guaranteed for this block of rooms. If you want more information on the hotel and amenities, you can visit the hotel website at **www.westinbayshore.com**.

In addition, to the conference dates of April 11th to 13th, 2011, the Westin Bayshore has extended conference rates from April 9 to 17, 2011 for those delegates who want to extend their stay either before or after the conference and enjoy the conference rates extended to Police Leadership 2008 Conference delegates only. Rates are $180 in the main building and $182 in the tower (based on single occupancy).

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HOTEL RESERVATIONS

4:1 PRE-TRIAL CUSTODY CREDIT GRANTED FOR CHARTER BREACH

R. v. Rashid 2010 ONCA 591

The accused was found guilty in the Ontario Court of Justice for assaulting his wife and son during a domestic incident occurring in their home. Following the guilty finding, the accused made an application under s. 24(1) of the *Charter* for a stay of proceedings on the basis that his rights under s. 9 of the *Charter* had been breached. The police had an unwritten policy of automatic and routine detention of all persons charged with domestic violence until they attended a bail hearing before a judicial officer. Police did not consider releasing persons charged with domestic violence under to s. 498 of the *Criminal Code*. The trial judge stated:

> [The officer] never gave at the time consideration to the factors in s. 498 (1.1) either personally or through an Officer in Charge to form any personal, subjective belief that [the accused's] detention was necessary

This, in the judge's view, was a systemic abdication of legal responsibility by the police. The judge did not impose a stay of proceedings as the accused requested. Instead he enhanced credit for pre-trial custody on a 4 for 1 basis. The accused was sentenced to 21 days in custody, to be served intermittently, followed by 2 years probation. His appeal to the Ontario Superior Court of Justice was dismissed.

The accused then challenged the trial judge's refusal to stay the charges to the Ontario Court of Appeal. Although the Crown did not contest the finding of the *Charter* breach nor the denunciation of the police policy, Ontario's top court stated:

> The trial judge in this case applied the proper legal principles and exercised his discretion to craft a remedy that appropriately addressed the circumstances of the breaches and the public and individual interests at stake. ...
>
> In refusing leave, we should not be taken to be minimizing the importance of Charter principles regarding the granting of pre-trial release. However, this issue was addressed by the courts below. Specifically, with respect to the ... Police Services Policy, there was clear recognition that this systemic policy led to a serious Charter breach and clear judicial denunciation of the practice.
>
> The summary conviction appeal judge concluded that the denunciation of the ... Police Services detention practice together with the enhanced credit for pre-trial custody properly addressed the seriousness of the breach. The summary conviction appeal judge then went on to state that "[i]t is strongly urged that the policy of routine detention of those charged with domestic violence be immediately terminated." [pars. 6-8]

Complete case available at www.ontariocourts.on.ca

WARRANTS UNDER DIFFERENT PROVISIONS, FOR DIFFERENT PURPOSES & DIFFERENT ITEMS, NOT 'SIMULTANEOUS'

R. v. Black, 2010 NBCA 65

Following a drug and proceeds of crime investigation code named "Operation Jackpot", police obtained two search warrants to be executed during the same hours. The first search warrant was issued by a Provincial Court judge under s. 487 of the *Criminal Code*. It authorized the police to search the accused's residence for various documents, including invoices, cancelled cheques, deposit slips, withdrawal slips, cheque books and ledgers. The second search warrant was issued by a Court of Queen's Bench judge under s. 462.32 of the *Criminal Code* (special search warrant - proceeds of crime) It authorized a search for a Chevrolet pick-up truck, a Chevrolet Camaro, Snowmobiles and Seadoos owned by the accused. Several individuals were arrested, including the accused. Following his trial in New Brunswick Provincial Court, the accused was convicted of several drug counts related to the

production and sale of marijuana, as well as conspiracy to launder, conspiracy to possess property or proceeds of crime, laundering the proceeds of crime, and possessing property knowing it was obtained by crime. In addition to sentences of incarceration, the trial judge ordered forfeiture of the criminal proceeds.

The accused challenged his conviction to the New Brunswick Court of Appeal arguing, in part, that the warrants were issued "simultaneously" and, as such, constituted an "abuse of process" requiring they both be quashed. But Justice Bell, speaking for the Court of Appeal, disagreed. Warrants to be executed at the same time and the same premises are not necessarily, by definition, "simultaneous". Rather, "a simultaneous warrant is one issued for purposes of searching the same premises for the same items in circumstances where the validity of the first one has not yet been decided." Justice Bell stated:

> Each warrant in this case had a distinct purpose. The purpose of the general warrant (s. 487) was to authorize a search for documents that would afford evidence of an offence. The purpose of the special warrant (s. 462.32) was to authorize a search for motor vehicles, vessels and snowmobiles that might eventually be subject to forfeiture in the event the accused was found guilty of a designated offence. Because the second warrant was issued under a different provision of the Code, for different purposes and for different items, it could not, in any circumstance, have been considered a "simultaneous" warrant as contemplated by the jurisprudence. [references omitted, para. 10]

Even if there is a finding that a warrant has been issued "simultaneously" both need not be quashed; only the second warrant will fall. Here, Justice Bell would not have reversed the trial judge for failing to quash the second warrant even if had been issued "simultaneously". Remedies will only be fashioned for abuse of the court's process in the clearest of cases and judicial intervention is warranted only when the conduct shocks the conscience of the community and is detrimental to the interests of justice. In this case there was "nothing about the circumstances surrounding the issuance of the warrants that demonstrate[d] any bad faith or improper motive on the part of the police," said the Court of Appeal. "There [was] no evidence of anything that would shock the conscience of the community."

Complete case available at www.canlii.org

NO SEARCH WHEN UNDERCOVER OFFICER INVITED INSIDE TO VIEW BUY MONEY

R. v. Roy, 2010 BCCA 448

The police engaged in an elaborate reverse sting operation to obtain evidence against a criminal organization. It required police to engage in what would otherwise be criminal activity by selling drugs to those targeted. In doing so, police enlisted the assistance of an agent who had infiltrated the organization. While executing their plan, police were led to the accused, who was not known to them and therefore had not been an original target. Contact with the accused was made through two intermediaries, who were shown marihuana by the police and the sale of 100 pounds for $160,000 was negotiated. The police asked to see the money before making arrangements to conclude the sale, but the accused refused to leave his home with the money. He invited the police to go to his home and see the money there. The agent was taken to the home by the intermediaries and was shown a substantial amount of cash. The following afternoon, a police officer, still posing as a drug dealer, was taken to the home by one of the intermediaries. The accused invited him in, showed him $135,000 in a box and told him that another $35,000 or $40,000 was available at the premises. The accused then took the officer to a nearby building and showed him quantities of harvested marihuana as indicative of the quality he expected. The officer then signalled for an arrest team waiting nearby. The accused was arrested and the home and grounds were secured by the police They went through the house and garage looking for people who could destroy evidence or cause the police harm. It took about five minutes to clear the house and two minutes to clear the garage. A search warrant was subsequently obtained and executed.

At trial in British Columbia Supreme Court, the accused argued that his s. 8 *Charter* rights were breached when the police, acting undercover as drug dealers, deceived him as to their identity in order to gain entry into his home for the purpose of seeing and seizing money which he had told them he would use to buy marihuana they offered to sell him. In the trial judge's view, however, the accused's reasonable expectation of privacy had not been breached. Thus there could be no unreasonable search or seizure. The accused had invited undercover agents onto his property for the express purpose of viewing the purchase money and it could not be expected that they would reveal themselves before taking up the invitation. No warrant was required because of this express invitation. The application to exclude evidence was dismissed and the accused was convicted of conspiracy to traffic in marihuana and possession of marihuana for the purpose of trafficking.

The accused challenged the trial judge's ruling to the British Columbia Court of Appeal, contending, among other grounds, that he had a reasonable expectation of privacy in his home and that it was reasonable for him to expect that the police would not enter upon his property for the purpose of seeing and seizing the purchase money without valid judicial authority. In his view, the invitation he extended to the undercover officer was obtained through deception and he knew nothing of its consequences. Therefore he maintained a reasonable expectation of privacy in his home which was not validly waived and the subsequent warrantless search was conducted in the absence of any exigent circumstances.

Justice Lowry, authoring the unanimous British Columbia Court of Appeal judgment, disagreed with the accused. When examining a s. 8 *Charter* challenge, there are two distinct questions to be answered:

1. did the accused had a reasonable expectation of privacy? "A reasonable expectation of an accused person's privacy must be determined based on the totality of the circumstances and may include consideration of factors such as the accused's presence at the time of the search, possession or control of the property searched, the existence of a subjective expectation of privacy and the objective reasonableness of that expectation."
2. if the accused did have a reasonable expectation of privacy, was the search an unreasonable intrusion on that right to privacy?

Waiver

The Court first distinguished between a person waiving their expectation of privacy in the sense of abandoning it and waiving their constitutional right to be free from unreasonable search and seizure. In the former it is through the actions of the accused that alters the scope of their expectation of privacy, such as placing household trash at one's property line for disposal. There is no longer an expectation of privacy and therefore there can be no unreasonable search or seizure. In the latter, an otherwise unreasonable search or seizure becomes permissible because the accused has consented to it. For example, where a person is asked to consent to a search of trash while it is still located within their home, they are essentially being asked to consent to an otherwise unconstitutional search and, thus, to waive the constitutional right to be secure against unreasonable search and seizure. In this case, the question was whether the accused, by his actions, waived or abandoned his expectation of privacy such that no s. 8 search or seizure occurred. There was no question of whether he was waiving a constitutional right by consenting to an unlawful search and seizure.

Although generally, a person's private residence is a place where a reasonable expectation of privacy will arise there are limits to this general proposition. A person, by their actions, may alter the reasonable expectation of privacy they may have in their residence. Here, the undercover officer attended the accused's residence for the purpose of concluding a drug transaction. The accused refused to complete the transaction by allowing police to view the purchase money in any location other than his private residence. In so doing, he converted his residence to a place of business and thus altered his reasonable expectation of privacy in his home. The invitation to approach the accused's residence for

the purpose of completing the drug transaction was an express invitation to enter his home and observe the purchase money:

> So long as the police act in accordance with the express invitation, they cannot be said to intrude upon the privacy interests of the occupant. Here, the express invitation authorized the undercover officer to enter the [accused's] home, to view the purchase money and to observe the harvested marihuana in the garage. At no time did the undercover officer's actions exceed the limits of this invitation. As a result, no violation of any privacy interest of the [accused] can be said to have occurred. [para. 31]

Nor did the police exceed the accused's invitation to view the purchase money by virtue of their ulterior purpose of collecting evidence against him. This was different from the situation where police, relying on implied invitation to knock, have two purposes for approaching an accused's door – (1) to speak with the accused and (2) to conduct a search by sniffing the air for marihuana. Only the first purpose is authorized by the implied invitation to knock and an infringement can occur because the police pursued the unauthorized purpose of searching for marihuana. Here, the accused is complaining about how the police chose to use the information they obtained through pursuing an authorized purpose. "Police do not require authorization to use information they properly obtain through undercover operations," said Justice Lowry:

> In the absence of the [accused] having established that the police violated the reasonable expectation of privacy that, in the absence of his express invitation, he would have had, there was no s. 8 search and seizure conducted. It follows that it is then unnecessary to go on to the second stage of the analysis and consider whether any search or seizure was unreasonable. [para. 33]

The accused's appeal was dismissed.

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

Note-able Quote

"Sometimes you cannot believe what you see, you have to believe what you feel." - Morrie Schwartz

NO RIGHT TO LAWYER IN INTERROGATION ROOM

R. v. Sinclair, 2010 SCC 35

The accused was arrested for murder and advised of his right to retain and instruct counsel without delay, that he could call any lawyer he wanted, and that a Legal Aid lawyer would be available free of charge. He was transported to the police detachment where he twice spoke by telephone in private with a lawyer of his choice, each time for about three minutes. Later he was interviewed by a police officer. Before the interview began, the officer confirmed with the accused that he had been advised of and had exercised his right to counsel. He was also warned that he did not have to say anything and that the interview was being recorded and could be used in court. During the five hour interview the accused stated on four or five occasions that he did not want to talk to the officer, wished to speak with his lawyer again, and wanted his lawyer present during the interview. However, the officer deflected the requests, advising the accused that he did not have the right to have his counsel present, and continued with the questioning, gradually revealing more of the evidence against the accused as the interview wore on. Eventually, the accused implicated himself in the victim's death, stating he hit him over the head with a frying pan, stabbed him several times, slit his throat, and disposed of the body in a dumpster. Later, the police placed him into a cell with an undercover officer where he made similar incriminating statements. the accused also accompanied the police to where the victim had been killed and participated in a re-enactment.

At trial in British Columbia Supreme Court the statements during the interview, the exchange with the undercover officer, and the re-enactment were proven voluntary beyond a reasonable doubt. The trial judge also found there were no s. 10(b) *Charter* breaches and the statements were admitted. A conviction for manslaughter followed. The British Columbia Court of Appeal upheld the conviction, finding an arrestee had no right to terminate questioning by asserting a desire to again speak with

a lawyer. The accused then appealed to the Supreme Court of Canada, again arguing that s. 10(b) imposed a duty on police to stop questioning a detainee who had already exercised their right to counsel but wanted to talk to a lawyer again. Further, he also argued that s. 10(b) required police , at the detainee's request, to have counsel present during a custodial interrogation.

"s. 10(b) should not be interpreted as conferring a constitutional right to have a lawyer present throughout a police interview."

Chief Justice McLachlin and Justice Charron, co-authoring the five member majority opinion, dismissed the accused's appeal. The majority found that an initial warning, coupled with a reasonable opportunity to consult counsel when the detainee invokes the right, will satisfy s. 10(b) in most cases. They also held that s. 10(b) does not mandate the presence of defence counsel throughout a custodial interrogation.

s. 10(b) – A One-Time Matter or a Continuing Right?

The majority noted that s. 10(a), the right on arrest or detention "to be informed promptly of the reasons therefor", imposed a duty on police to give the detainee information at a discrete point in time. There is no requirement to convey this information more than once, unless the reasons themselves change. The right of *habeas corpus* found in s. 10(c), on the other hand, is a continuing right.

The purpose of s. 10(b) is to inform the detainee of their rights and provide them with an opportunity to get legal advice immediately upon detention relevant to their legal situation on how to exercise their rights which, in the case of a custodial interrogation, is primarily to understand their s. 7 right to choose whether to cooperate with the police or not (the right to silence). The purpose is fulfilled in two ways. First, the detainee must be advised of their right to counsel (**informational component**). Second, the detainee must be given an opportunity to exercise their right to consult counsel and there is a duty on the police to hold off questioning until the detainee has had a reasonable opportunity to do so (**implementational component**). However, if a detainee invoking the right to counsel is not reasonably diligent in exercising it, the correlative duties on the police to provide a reasonable opportunity and to refrain from eliciting evidence will either not arise in the first place or will be suspended. A detainee who has been informed of their right to consult counsel may also waive the right. Section 10(b), on the other hand, does not provide an ongoing right to legal assistance during the course of an interview, regardless of the circumstances. The majority stated:

> We conclude that in the context of a custodial interrogation, the purpose of s. 10(b) is to support the detainee's right to choose whether to cooperate with the police investigation or not, by giving him access to legal advice on the situation he is facing. This is achieved by requiring that he be informed of the right to consult counsel and, if he so requests, be given an opportunity to consult counsel. [para. 32]

Finally, a detainee has an absolute right to silence and therefore ultimate control over the interrogation. They have the right not to say anything, to decide what to say, and when. Normally, s. 10(b) will afford the detainee a single consultation ("a one-time matter") with a lawyer. And it will be assumed that the initial legal advise received was sufficient and correct in relation to how the detainee should exercise their rights in the context of the police interrogation.

Right to Have a Lawyer Present During the Interview

The majority refused to transplant a U.S. Miranda style rule, which recognizes a right to have counsel present during a police interview, into the scope of s. 10(b):

> We conclude that s. 10(b) should not be interpreted as conferring a constitutional right to have a lawyer present throughout a police interview. There is of course nothing to prevent counsel from being present at an interrogation where all sides consent, as already occurs. The police remain free to facilitate such an

> arrangement if they so choose, and the detainee may wish to make counsel's presence a precondition of giving a statement. [para. 42]

Right to Re-Consult Counsel

There will be some circumstances where a further consultation with counsel may be constitutionally required. This will generally occur where there is a material change in the detainee's situation after the initial consultation. This further right to an additional consultation will arise where there are new developments occurring which may render the initial advice no longer adequate and further consultation will be needed to fulfill the purpose of s. 10(b) - to provide the detainee with legal advice on their choice of whether to cooperate with the police investigation or decline to do so. In order to guide police investigators, the majority provided some examples where the right of further consultation is required.

New Procedures Involving the Detainee. These would include non-routine procedures, like participation in a line-up or submitting to a polygraph, which will not generally fall within the expectation of the advising lawyer at the time of the initial consultation. The initial advice of legal counsel will be geared to the expectation that the police will seek to question the detainee. It follows that to fulfill the purpose of s. 10(b) - providing the detainee with the information necessary to making a meaningful choice about whether to cooperate in these new procedures - further advice from counsel is necessary.

Change in Jeopardy. The detainee is advised upon detention of the reasons therefor (s. 10(a)). The s. 10(b) advice and opportunity to consult counsel follows this. The advice given by counsel will be tailored to the situation as the detainee and his lawyer then understand it. If the investigation takes a new and more serious turn as events unfold, the initial advice given may no longer be adequate to the actual situation, or jeopardy, the detainee faces. In order to fulfill the purpose of s. 10(b), the detainee must be given a further opportunity to consult with counsel and obtain advice on the new situation.

Reason to Question the Detainee's Understanding of their s. 10(b) Right. If circumstances indicate that a detainee may not have understood the initial s. 10(b) advice about the right to counsel, a duty may be imposed on the police to give the detainee a further opportunity to talk to a lawyer. Similarly, if the police undermine the legal advice that the detainee has received, this may have the effect of distorting or nullifying it, thereby undercutting the purpose of s. 10(b). In order to counteract this effect, it has been found necessary to give the detainee a further right to consult counsel.

The common police tactic of gradually revealing (actual or fake) evidence to the detainee in order to demonstrate or exaggerate the strength of the case against him does not automatically trigger the right to a second consultation with a lawyer, giving rise to renewed s. 10(b) rights. However, the police are at liberty to facilitate any number of further consultations with counsel, perhaps even using this as a technique to reassure a detainee that further access to counsel will be available if needed.

These few recognized exceptions, or change of circumstances, must be objectively observable in order to trigger the additional implementational duties. For example, it is not enough for an accused to merely assert after the fact that they were confused or needed help.

In this case, the accused did not fall into any of the recognized categories for a renewed right to counsel. His jeopardy remained the same (a murder charge), he was not asked to participate in a line-up, he was never confused about his legal options, and the police representations as to the strength of the evidence against him did not require the need to talk to a lawyer again. The accused's s. 10(b) rights were not breached and his appeal was dismissed.

Different Views

Justice Binnie also declined to adopt the submission that s. 10(b) requires the presence of defence counsel, on request, during a custodial interrogation. In his view, however, a further consultation with counsel may be required not only in "changed circumstances" but also in "evolving circumstances." The detainee's request to consult

again with a lawyer must be (1) related to the need for legal assistance, not simply to delay or distract from the police interrogation, and (2) such a request must be reasonably justified by the objective circumstances, which were or ought to have been apparent to the police during the interrogation. Justice Binnie would have excluded the confessions and the re-enactment, allowed the appeal, and ordered a new trial. Justices Lebel and Fish, writing a three member minority opinion, found Justice Binnie's intermediate stance on s. 10(b) did not go far enough. They favoured an ongoing right to the assistance of counsel, not merely a one-time consultation. They too, like Justice Binnnie, would have excluded the confessions and the re-enactment, allowed the appeal, and ordered a new trial.

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

TIME TO CALL LAWYER OF CHOICE NOT UNLIMITED

R. v. McCrimmon, 2010 SCC 36

The accused was arrested at his home in relation to eight assaults committed against five different women. Upon being informed of the reasons for his arrest, his right to counsel (including Legal Aid), and his right to remain silent, he stated that he wished to speak to his own lawyer. He was transported to the police detachment where the police were unable to reach the lawyer he requested - they called the lawyer's office and left a message on an answering machine. The accused agreed to contact Legal Aid and he spoke to duty counsel in private for about five minutes, afterwards confirming he was satisfied with and understood the advice. Before he was interviewed, about 4 ½ hours after he was placed in cells, he confirmed he spoke to Legal Aid and had nothing to say to police. During the course of the police interrogation that lasted for more than three hours, he stated several times that he wanted to speak to a lawyer, to have a lawyer present, to be taken back to his cell, and that he was not going to answer questions. His requests were denied and he eventually admitted to his involvement in the offences. He was charged on an eight-count indictment with a number of offences relating to assaults committed against four women during a two-month period.

At trial in British Columbia Provincial Court the judge found the accused's s. 10(b) *Charter* rights were met when he spoke to Legal Aid. His statement was admitted and he was convicted on two counts of sexual assault and two counts of administering a noxious substance. The British Columbia Court of Appeal upheld the accused's convictions, finding no s. 10(b) breach. Since he had exercised his right to counsel by speaking to Legal Aid and had expressed satisfaction with the advice, he had no right to speak to the lawyer of his choice prior to being interviewed. His contention that the police were also required to refrain from questioning him once he asked to speak with a lawyer again was also rejected. He appealed to the Supreme Court of Canada arguing that his rights under s. 10(b) were violated when the police failed to hold off the custodial interview until he consulted counsel of his choice, denied him the right to have counsel present during the interview, and repeatedly denied his requests for further consultation during the course of the interrogation.

For the reasons expressed in *Sinclair*, the majority rejected the accused's argument that he was entitled, at his request, to have his lawyer present during his interrogation.

Right to Counsel of Choice

Included in s. 10(b) is the right to choose counsel:

> Where the detainee opts to exercise the right to counsel by speaking with a specific lawyer, s. 10(b) entitles him or her to a reasonable opportunity to contact chosen counsel. If the chosen lawyer is not immediately available, the detainee has the right to refuse to contact another counsel and wait a reasonable amount of time for counsel of choice to become available. Provided the detainee exercises reasonable diligence in the exercise of these rights, the police have a duty to hold off questioning or otherwise attempting to elicit evidence from the detainee until he or she has had the opportunity to consult with counsel of choice. If the chosen lawyer cannot be available

> within a reasonable period of time, the detainee is expected to exercise his or her right to counsel by calling another lawyer, or the police duty to hold off will be suspended. [para. 17]

"If the chosen lawyer cannot be available within a reasonable period of time, the detainee is expected to exercise his or her right to counsel by calling another lawyer, or the police duty to hold off will be suspended."

However, what is a reasonable amount of time will depend on the circumstances as a whole, including the seriousness of the charge and the urgency of the investigation. The purpose of the right to counsel on arrest or detention is intended to provide detainees with immediate legal advice about their rights and obligations under the law, most notably the right to remain silent. Because of this need for immediate legal advice, information about the existence and availability of duty counsel and Legal Aid plans are part of the standard caution and the detained person must exercise reasonable diligence. Since the accused had agreed to speak to Legal Aid when his lawyer was not immediately available and expressed satisfaction with the advice, there was no further obligation on the police to hold off the interrogation until such time as his lawyer of choice became available.

Renewed Right to Counsel

In *Sinclair* the majority concluded that detainees should be able to speak to a lawyer again during the course of a custodial interrogation where there is a change in circumstances such as new procedures involving the detainee, a change in the jeopardy facing the detainee, or reason to believe the first information provided was deficient. However, here there was no objectively discernible change in circumstances which gave rise to a right to consult again with counsel. The gradual or progressive revelation of evidence that incriminates the detainee does not, without more, give rise under s. 10(b) to a renewed right to consult with counsel. However, where developments in the investigation suggest that the detainee may be confused about his choices and right to remain silent, the right to another opportunity to speak with a lawyer under s. 10(b) may be triggered. But there were no changed circumstances during the course of the interrogation that required another consultation with a lawyer.

The accused's appeal was dismissed and his convictions were affirmed.

Different Views

Justice Binnie would have also dismissed the appeal, but for somewhat different reasons. In his view, the accused's s. 10(b) right to counsel was not exhausted when he received his initial advice from duty counsel. Although his further requests were for the purposes of satisfying a need for legal assistance, rather than delay or distraction, there was nothing to suggest his requests could be considered reasonably justified by the objective circumstances that were or ought to have been apparent to the officer. The three judge minority, on the other hand, concluded that the accused's incriminating statements should have been excluded. He sought but was denied access to counsel. In their view, the right to counsel is not spent upon an initial exercise of it and a renewal of the right does not depend on a manifest or material change in jeopardy in the opinion of the police interrogator. They would have ordered a new trial.

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

s. 10(b) DOES NOT REQUIRE POLICE TO MONITOR QUALITY OF LEGAL ADVICE

R. v. Willier, 2010 SCC 37

The accused was arrested around noon on a Saturday in connection with the murder of a woman found stabbed to death in her house. He admitted he had taken some pills and was escorted to the hospital out of a concern for his health. He was subsequently cautioned in the emergency ward, about five hours after his arrest. Police told him that he could call any lawyer he wanted, informed him of the availability of free duty counsel, and provided him with a telephone book and the toll-free number for Legal Aid. He said he

understood the rights and that he wanted to wait until the next day to contact counsel. Around midnight, after being released from the hospital and taken to the police detachment, the accused was again cautioned and, after asking to speak with a free lawyer, spoke to Legal Aid for about three minutes in private. He was then placed back in his cell. Around 8 a.m. Sunday morning, the accused was offered another opportunity to speak to counsel. He chose to speak to his lawyer of choice and a message was left on an answering machine. An officer told the accused that his lawyer would likely not be available until the next day since the office was closed, and he opted to speak to duty counsel again – this call lasted about one minute. About an hour later he was taken for an interview, but prior to it starting he was offered another opportunity to contact a lawyer, which he declined. He was re-cautioned about his right to silence, told anything he said could be used as evidence, and told he could stop the interview at any time and call a lawyer. He was then interviewed by a police investigator for approximately three hours. It was videotaped.

> "While s. 10(b) requires the police to afford a detainee a reasonable opportunity to contact counsel and to facilitate that contact, it does not require them to monitor the quality of the advice once contact is made."

During a *voir dire* in the Alberta Court of Queen's Bench, the accused's statement to the police was declared inadmissible as a result of his *Charter* right to counsel being violated. The trial judge identified two s. 10(b) breaches. First, the accused was not informed of his right to counsel immediately upon arrest, but at the hospital some hours later. The judge, however, found this to be insignificant because no evidence was gathered during this delay. Second, he found the police actively discouraged the accused from waiting for a return call from his lawyer of choice. The lack of investigative urgency and the absence of any indication that his lawyer of choice would not be available within a reasonable time, the police failure in holding off with the interrogation amounted to a s. 10(b) breach. Given the brevity of the two conversations the accused did have with counsel, they were insufficient for him to have a meaningful opportunity to retain and instruct counsel. He was acquitted, but the Alberta Court of Appeal, by a majority (2:1), allowed the Crown's appeal and ordered a new trial.

The majority found the trial judge erred in basing a *Charter* breach on the inferred inadequacy of the legal advice the accused had received. Section 10(b) does not require the police to monitor the quality of legal advice received by a detainee. A solicitor-client communication is privileged and the police are not entitled to know its content. Even if they were voluntarily informed of the advice provided, it would be inappropriate for police to second-guess its adequacy. Finally, the police have a duty to ensure a detainee is aware of the availability of immediate and free legal consultation. They were merely fulfilling this duty when the accused was told about the availability of Legal Aid after his unsuccessful attempt to contact his lawyer of choice. He talked to Legal Aid twice, expressed satisfaction with the advice, and he decided not to call counsel again when provided the opportunity prior to the interview. He also waived any continuing right to speak with counsel and the police were entitled to question him - their obligation to hold off was suspended. A new trial was ordered. The accused appealed to the Supreme Court of Canada claiming he had not been given a reasonable opportunity to consult counsel of his choice.

In this decision, all nine of Canada's top jurists agreed that the accused's appeal should be dismissed. Chief Justice McLachlin and Justice Charron, again writing for a five justice majority, found the accused had exercised his right to counsel by opting to speak with Legal Aid. Since he did not try to relinquish his right to counsel nor waive his s. 10(b) right, there was no requirement for the police to provide an additional informational warning that he had a reasonable opportunity to contact counsel of his choice and that the police were obliged to refrain from questioning him until he was afforded such an opportunity.

Nor would the majority accept his claims that his duty counsel consultations were insufficient because they did not amount to a meaningful exercise of the

right. The police are not required to ensure that a detainee's legal advice meets a particular qualitative standard before they question him or her:

> While s. 10(b) requires the police to afford a detainee a reasonable opportunity to contact counsel and to facilitate that contact, it does not require them to monitor the quality of the advice once contact is made. The solicitor-client relationship is one of confidence, premised upon privileged communication. Respect for the integrity of this relationship makes it untenable for the police to be responsible, as arbiters, for monitoring the quality of legal advice received by a detainee. To impose such a duty on the police would be incompatible with the privileged nature of the relationship. The police cannot be required to mandate a particular qualitative standard of advice, nor are they entitled to inquire into the content of the advice provided. Further, even if such a duty were warranted, the applicable standard of adequacy is unclear. … [T]here is a "wide range of reasonable professional assistance", and as such what is considered reasonable, sufficient, or adequate advice is ill defined and highly variable. [para. 41]

So even though the accused's conversations with Legal Aid were brief, unless a detainee indicates diligently and reasonably that the advice they received is inadequate the police may assume that the detainee is satisfied with the exercise of the right to counsel and are entitled to commence an investigative interview. The accused gave no indication that his consultations were inadequate. Rather, he expressed his satisfaction with the legal advice he received to the interviewing officer prior to questioning. The police did not breach the accused's right to counsel and the decision reversing his acquittal and ordering a new trial was upheld.

Four More Agree With the Outcome

Justice Binnie agreed that the appeal should be dismissed. In his view, the accused, prior to being questioned, expressed satisfaction speaking to Legal Aid and with the advice he had received. He did not pursue any further opportunity to contact his lawyer of choice even though he was offered an open-ended invitation to contact counsel prior to and throughout the interview. Justices Lebel and Fish, with Justice Abella agreeing, also upheld the order of a new trial. They opined that the accused was given ample opportunity to exercise his s. 10(b) rights, but failed to exercise them with diligence.

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

SUPREME COURT DISMISSES LEAVE IN OTHER s. 10(b) CASES

In November the Supreme Court also dismissed leave to appeal in two more cases involving challenges to s. 10(b). In ***R. v. Anderson, 2009 ABCA 67 application for leave to appeal dismissed [2009] S.C.C.A. No. 428***, the police conducted a lengthy undercover sting targeting the accused after the murder of a hotel janitor during a robbery. The accused made incriminating statements to undercover officers, including details of the murder and robbery that were held back by the police. The accused was arrested for murder, read his *Charter* rights, and instructed on his rights to free legal advice and right to silence. He spoke to duty counsel by phone for about four minutes. He was interviewed over 1.5 hours later but was not re-*Chartered* nor again cautioned before the interview, although he was asked if had had spoken to a lawyer and whether he was satisfied with the legal advice he received. At the interrogation the accused asked to speak to a lawyer and stated he did not want to say anything. The interview proceeded after some discussion concerning his contact with duty counsel. He made incriminating statements.

The Alberta Court of Queen's Bench trial judge admitted the statements to the undercover officers and to the interrogating officer. As part of his ruling, the trial judge held that there was no s. 10(b) infringement in obtaining the statement. The trial judge was not persuaded that the interrogator was required to give any further *Charter* advisement to the accused when the arresting officer had already done so not long before the interview. His appeal to the Alberta Court of Appeal was dismissed. The Court of Appeal rejected his suggestion that, regardless of the circumstances, the police must

hold off from interviewing a detainee if they seem diffident about answering questions without more legal advice. He had also contended that a detainee did not have only a single opportunity to talk to a lawyer (the cinematic "one phone call"). The Court of Appeal found no general proposition in law that a detainee possesses a broad constitutional immunity from questioning, such that if a detainee indicates a reluctance to answer questions absent counsel, the police must treat that situation as triggering a fresh duty under s. 10(b) to "hold off" pending a further opportunity to speak to counsel. In holding there was no s.10(b) *Charter* breach, the Court of Appeal stated:

> The police are entitled to interview detainees after they have talked to counsel provided that there is no intervening breach of the detainee's Charter rights or involuntariness, or lack of operating mind. During such interviews, the police can "out manouevre" the detainee and persevere in their effort to acquire evidence by seeking to persuade the detainee to speak. [at para. 32]

In ***R. v. Alix, 2010 QCCA 1055 application for leave to appeal dismissed [2010] S.C.C.A. No. 278***, the accused was charged with first degree murder and attempted murder related to two separate fire incidents: (1) a fire that killed her mother in 2001 and (2) a fire that killed her one-year-old son in 2003. Following the fire at her home, the accused made various statements to a number of people, including police officers. Those statements were admitted in evidence by a Quebec Superior Court, including a statement made to police the day she was arrested. She was convicted by a jury of two counts of first degree murder, against her mother and daughter, and one count of attempted murder, against another person. The accused challenged the admissibility of her statements on several grounds, including a violation of her constitutional right to counsel when a police officer had refused to allow the presence of her counsel during the interrogation, and the violation of her right to have the interrogation suspended if she asked to contact counsel again. In this case the Quebec Court of Appeal had to determine whether a detained person was entitled to have counsel present during a police interrogation and whether her right to counsel was spent when she consulted counsel. The Court of Appeal found the accused had exercised her right to counsel initially, during a private telephone conversation, and again during a meeting with a lawyer at the police station. Once she exercised her rights, nothing prevented the police from starting to question her and to use reasonable means of persuasion. Nor was there a requirement to have the lawyer present during questioning. The accused's convictions were upheld and her appeal was dismissed.

USING RECORDED STATEMENT FOR VOICE COMPARISON DID NOT RENEW s. 10(b) RIGHT

R. v. Wu & Huynh, 2010 ABCA 337

Pursuant to a court order the police intercepted Wu's and his co-accused Huynh's communications. When they were arrested they were given their *Charter* rights and assisted in contacting their lawyer of choice. Wu spoke to counsel in private for about six minutes while Huynh spoke for something less than three minutes. An Alberta Court of Queen's Bench judge admitted the calls as evidence as well as the accuseds' statements. Although the statements were exculpatory, the police used the interview recordings for comparison with the wiretaps – to identify who was speaking. The men were convicted of cocaine trafficking, conspiracy to traffic, and Wu with an additional cocaine trafficking count.

They appealed their convictions arguing, among other grounds, that the recording of their voices during the interviews was a "non-routine procedure" (like participating in a physical lineup or providing physical samples such as blood) so that they should have been given a further s. 10(b) warning and a second opportunity to consult with counsel. But the unanimous Alberta Court of Appeal rejected this argument. In determining whether recording an interview and using it to compare the voice to wiretap recordings was the type of "non routine" procedure envisioned in *Sinclair* such that a

detainee should be given a further advisement of the right to counsel, the Court of Appeal stated:

> There is no physical difference between the police interviewing (and recording the interview) for the forensic purpose of seeking evidence from the content of the speaking, and the police doing precisely the same thing for the forensic purpose of seeking evidence from the characteristics of the speaking. No different activity is involved from the perspective of the detainee. No greater participation of the detainee is sought. So the question raised by the [accuseds] turns on whether an undisclosed motive or state of mind of the police in conducting an interview changes the nature of the jural relationship between the detainee and the police such as to trigger further duties of the police under s. 10(b) of the Charter. … [I]nteraction between police and a detainee may have multiple police purposes, and the purposes may evolve during the interaction. The crucial question there was whether the interaction was offensive to the Charter, not whether one purpose was more important than the other. The same can be said here.
>
> In our view, the fact that the police may have had more than one purpose in mind when interviewing the [accuseds] does not change the fact that there was no proven breach of s. 10(b) of the Charter before the interviews commenced. Nor did a s. 10(b) breach arise from any undisclosed intentions of the police. On these facts, we need not address the complex question as to when a shift in the nature and degree of the involvement of the detainee in the investigation is sufficiently different in a qualitative and juridical sense to warrant a second advisement and opportunity under s. 10(b) of the Charter. The Charter argument pressed here fails. [references omitted, paras. 70-71]

The accuseds' appeals were dismissed.

Complete case available at www.albertacourts.ab.ca

Note-able Quote

"Always concentrate on how far you have come, rather than how far you have left to go. The difference in how easy it seems will amaze you." - Heidi Johnson

Charter s. 10(b): Rights & Obligations Reviewed

Police - s. 10(b) duties ...

Informational Duty - triggered immediately upon arrest or detention

- to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel.

Implementational Duties - triggered only when detainee chooses (indicates a desire) to exercise their right to counsel

- to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
- to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

Should a detainee positively indicate that they do not understand their right to counsel, the police cannot rely on a mechanical recitation of that right and must facilitate that understanding. Generally, s. 10(b) will afford the detainee a single consultation with a lawyer. It will be assumed that the initial legal advise received was sufficient and correct in relation to how the detainee should exercise their rights in the context of the police interrogation.

Additional Informational Duty

- if a detainee, diligent but unsuccessful in contacting counsel, changes their mind and decides not to pursue contact with a lawyer, s. 10(b) requires the police to explicitly inform the detainee of their right to a reasonable opportunity to contact counsel and of the police obligation to hold off in their questioning until then. This has been referred to as a *Prosper* warning.

Detainee - must be reasonably diligent in exercising right

Police duties are contingent upon a detainee's reasonable diligence in attempting to contact counsel, whether this is duty counsel or counsel of choice (a specific lawyer). What amounts to reasonable diligence in the exercise of the right to contact counsel will depend on the context of the particular circumstances as a whole, including such factors as the seriousness of the charge and the urgency of the investigation. It is not about getting the best lawyer to conduct a trial, but rather about the immediate need for legal advice.

- if a detainee person is not diligent in exercising their right to counsel then the correlative duties imposed upon the police to refrain from questioning the detainee are suspended.
- if a chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond. If the chosen lawyer cannot be available within a reasonable period of time, detainees are expected to exercise their right to counsel by calling another lawyer or the police duty to hold off will be suspended.

Renewed Right to Counsel

Detainees should be given an opportunity to speak to a lawyer again where there is a change in circumstances such as:

- new procedures involving the detainee (eg. participation in a physical lineup or polygraph)
- a change in the jeopardy facing the detainee (the investigation takes a new and more serious turn as events unfold), or
- reason to question the detainee's understanding of their s. 10(b) right to counsel.

No Right to Have Lawyer Present During Questioning

There is no constitutional right to have a lawyer present throughout a police interview. However, the police can allow a lawyer to be present if the police choose to do so and the detainee may wish to make counsel's presence a precondition of giving a statement. See *R. v. Sinclair*, 2010 SS 35, *R. v. McCrimmon*, 2010 SCC 36, *R. v. Wilier*, 2010 SCC 37.

Other Considerations

Investigative Detention

The s. 10(b) right to counsel arises immediately upon detention, whether or not the detention is solely for investigative purposes. Thus, s. 10(b) of the *Charter* requires the police to advise a detainee that they have the right to speak to a lawyer, and to give them a reasonable opportunity to obtain legal advice if they so chose, before proceeding to elicit incriminating information from them. This of course is subject to concerns for officer or public safety. See *R. v. Suberu*, 2009 SCC 33.

Section 1 Limitations (driving)

The right to counsel under s. 10(b) is not absolute. It is subject to such limitations as prescribed by law and justified under s. 1 of the *Charter*.

For example, a lawful detention arising from a brief roadside stop pursuant to highway traffic legislation does not trigger the rights set out in s. 10(b). *R. v Harris*, 2007 ONCA 574.

Similarly, a demand to provide a breath sample into an approved screening device, although a detention, does not require the police to advise the detainee of their right to counsel provided the test is administered forthwith. *R. v. Thomsen*, [1988] 1 S.C.R. 640. A police officer may also suspend reading s. 10(b) *Charter* rights when they give a direction for a vehicle to pull over and check the driver's sobriety by asking questions about prior alcohol consumption or request a driver perform sobriety tests. *R. v. Orbanski*, *R. v. Elias*, 2005 SCC 37.

NO ENTRAPMENT: POLICE ALLOWED TO VIEW CRIMINAL TRANSACTION

R. v. Imoro, 2010 SCC 50

After receiving an anonymous tip that a man was selling drugs on the 12th floor of an apartment building, police decided to investigate and an undercover officer went to the apartment building and took the elevator to the 12th floor. When the elevator doors opened, the accused approached the officer and said, "Come with me." The officer responded, "You can hook me up?" and the accused answered, "Yeah man." He led the officer and another man, who had been on the elevator with the officer, to his apartment. Once inside the accused sold some marijuana to the other man and then asked the officer what he needed. The officer said "hard", meaning crack cocaine, but the accused said that he had only "soft", meaning powdered cocaine. The officer asked for $40 worth and was provided with a bag of cocaine from some prepackaged supplies. The officer used police 'buy money' to make the deal. The next day the officer went back and the accused opened the door, greeted him, and sold him another $40 worth of cocaine. Police then obtained a search warrant for the apartment and seized cocaine, marijuana, and the police 'buy money'. The accused was arrested and charged with two counts each of trafficking in cocaine, possessing controlled substances (cocaine and marijuana) for the purpose of trafficking, and possessing proceeds of crime.

In court the accused plead not guilty, claimed entrapment, and brought a motion to exclude the evidence or stay the proceedings. The Ontario Superior Court Justice concluded that the conduct of the undercover officer amounted to entrapment. She found entrapment occurred at the time of the initial contact between the undercover officer and the accused. The officer's question, "Can you hook me up?" was the first reference to drugs raised by the officer (the accused made no prior offer). This gave the accused an opportunity to sell drugs and was done when the officer did not have a reasonable suspicion that the accused was engaged in drug trafficking. The trial judge then excluded the seized drugs and buy money and the accused was acquitted.

The Crown then argued before the Ontario Court of Appeal that the trial judge erred in finding that the accused was entrapped by police into committing drug trafficking offences.

Entrapment

Although the police must have considerable leeway in the techniques they use to investigate criminal activity - especially consensual crimes such as drug trafficking where traditional techniques may be ineffective - their powers of investigation cannot be untrammeled. Thus, the doctrine of entrapment reflects judicial disapproval of unacceptable police or prosecutorial conduct in investigating crimes. "In their efforts to investigate, deter and repress crime, the police should not be permitted to randomly test the virtue of citizens, or to offer citizens an opportunity to commit a crime without reasonable suspicion that they are already engaging in criminal activity, or worse, to go further and use tactics designed to induce citizens to commit a criminal offence," said Justice Laskin, writing the Court of Appeal's opinion. "To allow any of these investigative techniques would offend our notions of decency and fair play."

Entrapment can occur in two ways:

1. When the police, acting without reasonable suspicion or for an improper purpose, provide a person with an opportunity to commit an offence. To make out entrapment under this prong the court must find that the police provided an opportunity to commit an offence and that they did so without reasonable suspicion.

2. Even having reasonable suspicion or acting in the course of a good faith inquiry, the police go beyond providing an opportunity to commit a crime and actually induce the commission of an offence.

When entrapment is found "the court will not allow the Crown to maintain a conviction because to do so would be an abuse of process and bring the administration of justice in disrepute." A claim of entrapment involves a two-stage trial. Because the doctrine of entrapment does not put the accused's culpability into issue, but rather the conduct of the state, the judge (or jury) must first determine whether the accused is guilty of the crime. Has the Crown discharged its burden of proving beyond a reasonable doubt all the essential elements of the offence? If the accused is guilty then the judge moves to the second stage to consider entrapment. If the claim of entrapment is successful the standard remedy is for a court to enter a stay of proceedings.

Although the officer did not have a reasonable suspicion that the accused was engaged in drug trafficking when the officer asked "Can you hook me up?", Justice Laskin found the question did not provide the accused with an opportunity to sell drugs. Here the trial judge erred in properly distinguishing "between legitimately investigating a tip and giving an opportunity to commit a crime":

> By the question "Can you hook me up?" all the officer really asked [the accused] was whether he was a drug dealer. The question was simply a step in the police's investigation of the anonymous tip. It did not amount to giving [the accused] an opportunity to traffic in drugs. That opportunity was given later when the officer and his fellow passenger in the elevator were inside [the accused's] apartment. By then, having observed a drug transaction between [the accused] and the other man, the officer certainly had reasonable suspicion – indeed virtually certain belief – that [the accused] was engaged in drug trafficking. [para. 16]

Thus, no entrapment occurred, the acquittals were set aside, verdicts of guilty were entered, and the case was returned to the trial court for sentencing.

The accused then appealed to the Supreme Court of Canada. In a unanimous oral judgment Justice Lebel, for the seven member court, stated:

> Like the Court of Appeal for Ontario, we are all of the view that there was no entrapment. On the facts of this case, the brief conversation between the police officer and the [accused] near his apartment could not ground a finding of entrapment. The [accused] himself allowed the police officer to witness a criminal drug transaction. The [accused] was not induced to commit a crime, but was actually engaged in his criminal activities.

The accused's appeal was dismissed.

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

Editor's note: Facts and reasoning of the Ontario Court of Appeal taken from *R. v. Imoro*, 2010 ONCA 122.

HOT PURSUIT CAN ARISE EVEN IF CRIME NOT SEEN BY POLICE

R. v. Tetard, 2010 QCCA 2235

The accused was involved in a collision. His front bumper struck the rear door of a vehicle turning right at an intersection. The driver of the other vehicle approached the accused, smelled a strong odour of alcohol, and the accused admitted he had been drinking. The other driver contacted police but the accused fled the scene. The driver followed, noted the licence plate number, and called 911 using a cell phone. About 5-10 minutes later the accused arrived at his home and entered it. The complainant then saw the accused come out of the building with two other people and go back inside. A police officer arrived on scene about 5 minutes later and found the complainant who showed him the damage and gave a description of the driver. When the accused came onto the balcony and looked at them, the complainant identified him as the driver involved in hitting his vehicle. The officer identified himself and asked the accused to come to him. The accused went back inside his house. The officer ran to the unlocked door of the home, opened it, and went inside, finding the intoxicated accused. He was convicted of driving a car with a blood alcohol level above the legal limit. His appeal to the Quebec Superior Court was unsuccessful.

The accused then appealed to the Quebec Court of Appeal claiming the lower courts erred in concluding that the police had the right to enter his home without a warrant. But the Quebec Court of Appeal disagreed. The police may enter a home without a warrant in cases of hot pursuit, which has generally been defined as continuous pursuit conducted with reasonable diligence, so that pursuit and capture along with the commission of the offence may be considered as forming part of a single transaction. The Court explained the justification for such a rule this way:

1. It would be unacceptable for police officers preparing to make a legitimate arrest to be prevented from doing so merely because the offender had taken refuge in his home or that of a third party. The police should not be forced to stop a pursuit on the threshold of the offender's residence without making the home a sanctuary.

2. It is not desirable to encourage offenders to seek refuge in their homes or those of third parties as significant danger may be associated with such flight and the pursuit that may result.

3. The police, in a pursuit, may have personal knowledge of facts justifying the arrest, which greatly reduces the risk of error.

4. The flight usually indicates a consciousness of guilt by the offender.

5. It can be difficult to identify the offender without stopping them immediately.

6. The evidence of the offense that gave rise to the pursuit or evidence of a related offence may be lost (eg. signs of intoxication).

7. There is a risk that the offender would flee or commit a new offence and the police cannot be expected to provide unlimited surveillance of a residence in case the offender decides to exit.

The accused suggested, however, that this was not a case of hot pursuit and that the requirements of s. 529.3 of the *Criminal Code* were not met and therefore, a warrant of entry under s. 529.1 was required to authorize the arrest of the accused in his home.

Although the Supreme Court of Canada in *Feeney* concluded "that generally a warrant is required to make an arrest in a dwelling house", the exception of hot pursuit remained valid. Nor did the adoption by parliament of s. 529 of the *Criminal Code* result in the abolition of the hot pursuit exception.

In this case, the commission of the offence was seen by a citizen who contacted police, and followed and chased the accused. Under s. 494(1)(a) of the *Criminal Code* "Any one may arrest without warrant a) a person whom he finds committing an indictable offence." Here, the driver involved in the accident with the accused could arrest because he found him committing the crime of impaired driving (s. 253 CC) and failure to stop at an accident (s. 252 CC). Moreover, the police called to the scene had the power to arrest the accused under s.494(1)(b) CC ("Any one may arrest without warrant ... a person who, on reasonable grounds, he believes (i) has committed a criminal offence, and (ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.") The information provided by the complainant gave police reasonable grounds for believing that the accused had committed a criminal offence, he was running away from a person legally authorized to arrest him, and he was immediately pursued by the complainant. As well, the arrest by police could also be authorized under s. 495(1)(a). The police had reasonable grounds for believing that the accused had committed an offence. The accused's warrantless arrest was justified because of the need to identify him, collect or preserve evidence of the offence, or to prevent the continuation or repetition of it.

Furthermore, to recognize a distinction where the original hot pursuit was made by a citizen rather than a police officer would be artificial and illogical. It is immaterial whether the pursuit has been undertaken by a witness before the police are present at the scene. Hot pursuit can even arise where the police did not witness the events giving

rise to the offence. To the extent that there was a single transaction, the exception to the warrant requirement in cases of hot pursuit shall apply even if the original hot pursuit is that of a citizen and supplemented and completed by a police officer. In such a case, the arrest of a suspect does not require an entry warrant to arrest in a dwelling house. Here, the need to prevent destruction of evidence was a legitimate concern. The accused's arrest was required to proceed expeditiously to a breathalyzer test, avoid the additional intake of alcohol, and prevent him from driving again. And even if s. 529.3(2)(b) of the *Criminal Code* applied the conclusion would be the same. The situation that confronted the police made it impracticable to obtain a warrant to enter and the preservation of evidence required immediate intervention. Therefore, the police could arrest the accused in his home without obtaining a warrant to enter and his s. 9 *Charter* rights were not breached.

Complete case available at www.canlii.org

DETAINEE INDUCED TO ANSWER QUESTION BECAUSE IT WAS COLD

R. v. Brown, 2010 ONCA 622

A search warrant was executed on an apartment early one November morning following the deployment of stun grenades by the Emergency Task Force. The accused and other occupants, lightly clothed, were forced to the ground, handcuffed, and then led outside the apartment into the hallway. The officer in charge of the entry gave the accused abbreviated information about his right to counsel but did not caution him about his right to remain silent. Apartment windows were opened to clear smoke from the stun grenades and the temperature dropped. The accused and the other occupants were cold and shivering. The police retrieved shoes and coats from the apartment but the accused did not identify any of the coats initially retrieved as belonging to him. When asked where his coat was, the accused told the officer that it was on a chair in the living room, a location where another officer had found a firearm under the coat.

At trial in the Ontario Superior Court of Justice the Crown sought to lead the accused's statement as to the location of his coat to link him to the firearm. The trial judge found that there was a breach of the accused's s. 10(b) *Charter* right to counsel but that the breach was not serious because the accused was given some information as to his right to counsel and the statement should be admitted under to s. 24(2). The trial judge also found that the Crown had proven beyond a reasonable doubt that the statement was voluntary. The statement was admitted as evidence and the accused was convicted on several charges, including possession of a loaded restricted weapon and careless storage of a firearm. He was sentenced to seven months imprisonment and two years probation in addition to 14 months of time served.

The accused then appealed to the Ontario Court of Appeal arguing, in part, that the trial judge erred in ruling that his statement was proven to be voluntary. The Court of Appeal agreed. The trial judge made several errors that undermined his finding that the Crown had established beyond a reasonable doubt that the accused's statement was voluntary including:

1. **No Caution**. The accused had not been cautioned before he made the statement concerning his coat. Although the accused was given partial information as to his right to counsel at no time was he cautioned about his right to remain silent or that any statement he made could be used in evidence against him. "Where, as here, the accused was detained, whether or not formally arrested and charged, the presence or absence of a caution is a factor, and in many cases an important factor, in answering the ultimate question of voluntariness," said the Court of Appeal. "The trial judge's erroneous finding that a partial caution had been given was a legal error that had a direct bearing upon the issue of voluntariness."

2. **Inducement**. The accused was cold and shivering as he stood handcuffed in the hallway. The trial judge found the accused "would have expressed ownership of the

subject coat simply because it was cold at the time of the early morning raid and on the evidence, [he] was cold." However, the trial judge failed to take this into account when it came to the issue of voluntariness. "The [accused] was handcuffed, thinly clothed and shivering after having been roused from sleep by a stun grenade," said the Court of Appeal. "[He] was entirely in the control of the police, and ... he was motivated to answer the question about his coat by the fact that he was cold." The trial judge erred by failing to take this into account in assessing voluntariness.

The accused's appeal was allowed, his convictions for possessing a loaded restricted firearm and careless storage of it were set aside, and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

OBSERVATION POST PRIVILEGE MAY LIMIT CROSS EXAMINATION

R. v. Hernandez, 2010 BCCA 514

A police officer in a hidden observation post giving her a clear unobstructed street-level view observed what she believed was a drug transaction. At one point the officer was only five to six feet away from observing part of the activity. The accused was arrested by other officers and was found to have $113 on his person. A female companion of the accused was also arrested and found to have 4.0 grams of heroin, 1.9 grams of cocaine, 5.68 grams of rock cocaine, and a small amount of cash on her person.

At trial in British Columbia Supreme Court the officer described her observation post and her ability to observe and hear as follows:

- at the time of her observations, the sun was shining and the street was brightly lit, so that lighting and weather conditions were not a problem for her;
- her observation post had neither blinds nor curtains;
- her observations were made through glass;
- the observation post had been previously used by both the Vancouver City police and the RCMP;
- she was not in an elevated position, and made her observations from street level;
- she used no visual aids;
- while a passing motor vehicle would not have been an obstruction to her, a passing pedestrian could have been;
- she wore glasses while driving at night, but her eyesight was otherwise good;
- that the glass through which she was looking was partially open, such that she could hear some but not all conversation in the area she was watching; and
- that no promise of anonymity or non-disclosure had been made to a private person.

The officer refused to disclose the nature and location of her observation post because doing so would identify an investigative technique and preclude the continued use of the post on a regular basis, which could put the police and other people in the community in danger. She would not identify the community members who might be endangered by the identification of the observation post or explain how such a person or persons might be placed in jeopardy by such disclosure. She also would not say whether she was in a building or in a motor vehicle, whether the glass that she was looking through was tinted, whether she was wearing a disguise at the time, or describe the angle from which she made her observations. The trial judge accepted these concerns as legitimate. He weighed the factors of the case and found the damage to the public interest in the police being able to continue to use this observation post to investigate illegal transactions, particularly those involving drugs, did not prejudice the accused's ability to make full answer and defence by the officer declining to identify the observation post with more particularity.

In the trial judge's view, he was "not satisfied that information as to the location of the observation post beyond what [was] already in evidence [could] possibly affect the outcome of this trial." The Crown had established a claim for privilege over the observation post information and no further questioning that might tend to identify the location was permitted. The accused was convicted of possessing cocaine for the purpose of trafficking, trafficking in cocaine, possessing heroin for the purpose of trafficking, and trafficking in heroin.

The accused then appealed to the British Columbia Court of Appeal arguing that the restriction prohibiting him from cross-examining the officer more fully about the location of the hidden observation post and the ability of the officer to observe the alleged offences contravened his s. 7 *Charter* right to make full answer and defence.

Observation Post Privilege

In some cases the Crown may rely upon a privilege over observation post information even where the observer's testimony is the sole evidence against an accused. Justice Hinkson, writing the unanimous Court of Appeal judgment, noted the following framework to be used when observation post privilege is asserted:

- The judge must decide whether the Crown has shown that disclosure of the information sought would adversely affect the public interest.

- If the public interest would be adversely affected by disclosure of the information sought, then the judge must determine, having regard to both the public interest and the accused's right to a fair trial, whether upholding the privilege would prevent the accused from making full answer and defence.

- If the judge determines that upholding the privilege claim would not prevent the accused from making full answer and defence, then the claim will be upheld. However, if the judge determines that upholding the privilege claim would prevent the accused from making full answer and defence, then the judge must consider whether partial disclosure of the information sought can be made without adversely affecting the public interest and without preventing the accused from making full answer and defence. However, if upholding the claim even in part would prevent the accused from making full answer and defence, then the claim will not be upheld and disclosure of the information sought will be required.

- If the privilege claim is not upheld, then the Crown will have to decide whether it wishes to continue with the prosecution.

- If the privilege claim is upheld, then, at the conclusion of the trial, the trier of fact, in assessing the reliability of, and weight to be given to the observer's testimony, is entitled to take into account the limitations placed on the accused's ability to cross-examine that witness.

As noted, the Crown will have the alternative of either withdrawing the claim of privilege or entering a stay of proceedings. The ultimate safeguard of the privileged information lies in the Crown's power to enter a stay. As well, what if any weight is to be given to the evidence of the officer who made the observations or heard discussions from the observation post will be determined by the trial judge.

In this case, the trial judge weighed the competing interests and found the public interest in permitting the Crown to rely upon the privilege prevailed because the trial's result would not be affected. Therefore the accused's right to cross-examine could be limited. He did not unreasonably restrict the cross examination of the officer with respect to the details of the observation post. The trial judge weighed the accused's right to cross examine the officer about her observation post against observation post privilege and balanced the competing principles relating to the two by minimally limiting cross-examination. He also recognized that the restrictions on the accused's ability to cross examine with respect to the observation post could be ameliorated by taking those restrictions into account in determining the

weight to be given to the officer's evidence. The accused's argument that he was unduly restricted in cross examining the officer, thereby denying his rights under s. 7 of the *Charter,* was rejected. However, the accused's appeal was allowed on other grounds and a new trial was ordered.

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

LEGAL ADVICE BASED ON GUARDED COMMUNICATION MAY BE NO ADVICE AT ALL

R. v. Nelson, 2010 ABCA 349

The accused was at a lounge in Edmonton where a number of fights broke out, some involving him and a group of his friends. At some point in the evening someone began shooting in the entrance area of the lounge, killing three people and injuring three others. Police believed that either the accused, his brother, or one of their friends was the shooter. After learning that the accused was about to leave their jurisdiction, two police officers followed him to the airport where he was arrested for assault in a baggage drop off line for a flight to Toronto. The accused was read his *Charter* rights to legal counsel. He said he wished to speak to his lawyer and the two arresting officers, along with the accused, arranged to have the airfare refunded and his luggage recovered. The accused was transported downtown where he was strip searched. A detective designated to interview the accused re-arrested him for murder and again advised him of his *Charter* rights. The accused indicated that he wanted to talk with his lawyer and did so, in person, for 27 minutes. The lawyer left and the detective began his interview. The interview was interrupted when the detective left the room to attend to other duties. The detective returned to the interview room and the accused subsequently confessed after being told there was video surveillance showing him committing the murders. He later accompanied the detective to find the gun he had used, but was unsuccessful.

At trial in the Alberta Court of Queen's Bench the judge found that when the police first arrested the accused they should have inquired about using the RCMP facilities at the airport to allow the accused to exercise his right to counsel. But since no evidence was obtained from the accused until after he spoke with counsel of his choice there was no connection between the implementational breach under s. 10(b) and the statement. The accused was able to exercise his right to counsel before he gave any statement and the evidence was admissible under s. 24(2). The detective also testified that when he re-arrested the accused for murder he did not have reasonable and probable grounds to do so. But the trial judge held the initial arrest for assault was lawful, and that the accused's *Charter* rights were not breached when the detective re-arrested him for murder. The police could have detained the accused for investigative purposes and the arrest for murder had the effect of advising the accused of the jeopardy he faced. The detention was not arbitrary. The police had reasonable grounds to suspect the accused was intimately connected with the murder, and that his detention was necessary for further investigation. The police advised the accused of his jeopardy and he was able to obtain advice from his counsel of choice before he was questioned. Even if there was a breach in arresting the accused for murder absent reasonable and probable grounds the breach would be technical and the police could not be faulted for apprising him of his potential jeopardy before he consulted with counsel and made any statement. The statement would nonetheless be admitted under s. 24(2). The accused was convicted of three counts of second degree murder, two counts of aggravated assault, and one count of assault causing bodily harm.

The accused then appealed to the Alberta Court of Appeal submitting that the trial judge erred in admitting his statement to police because (1) the s. 10(b) *Charter* breach was dismissed for lack of connection between the delay and the statement, (2) the finding that the accused was not unlawfully detained when he was arrested for murder in the absence of reasonable and probable grounds, and (3) the s. 24(2) *Charter* analysis was in error as a result of these mistakes.

The Delay

The implementation obligations of s. 10(b) on the police include two components:

- the police must provide the detainee with a reasonable opportunity to exercise the right to counsel, and
- the police must refrain from eliciting evidence from the detainee until after the right to counsel is exercised.

"Immediacy does not mean instantaneous; practical considerations still play a role, particularly with respect to the police's obligation to implement an arrested person's contact with counsel."

Here, the trial judge interpreted the immediacy requirement under s. 10(b) to mean that the arresting officers should have taken steps to ascertain if the RCMP airport facilities were available as soon as the accused indicated that he wanted to speak with a lawyer. "We doubt that this was a Charter breach at all, as investigating what the RCMP had to offer might well have entailed further delays," said the Court of Appeal in its Memorandum of Judgment. "There was no guarantee that the appropriate facilities existed, or if they did exist, that they were not required for RCMP purposes. People are not always arrested in locations where it is possible for police to implement access to counsel. The delay that was involved in this case was, in the circumstances, minimal and the police refrained from questioning the [accused] until after he had a chance to meet with counsel of his choice face to face. Immediacy does not mean instantaneous; practical considerations still play a role, particularly with respect to the police's obligation to implement an arrested person's contact with counsel." The Court continued:

> In the facts of this case, dealing with the [accused's] luggage and ticket was reasonable. He did not suggest that he did not want to deal with this, or that he wanted to talk to a lawyer instead. Also, transporting him to headquarters was a necessary step and no information was elicited from him during this trip. Again, the [accused] did not ask why he was being transported before he got to speak with a lawyer. The delay was not long and the detective ensured that the [accused] spoke with counsel of his choice shortly after arriving at police headquarters.
>
> The trial judge concluded that the delay was long enough to require the police to offer the [accused] the choice of an immediate telephone call to counsel without oral privacy before he was transported to a secure facility where he could make a private call. Although there is support for that proposition in case law ..., calls made by accused persons in the presence of police are of doubtful value. The right to counsel means the right to consult in private. A person in the [accused's] position could not freely communicate with counsel if that communication was in the presence of the arresting officers. Advice based on guarded communication might well be no advice at all or could do more harm than good. [S]uch consultations are subject to privilege and that police are not entitled to know what is said. The less than halfway measure of overheard consultation is an inadequate alternative. [references omitted, paras. 19-20]

As well, there was no connection (temporal, contextual, causal or any combination thereof) between this proposed breach and the statement ultimately admitted into evidence. "The statement was given after [the accused] consulted with counsel of his choice and nothing hinted at a desire for further consultation," said the Court of Appeal. "[N]o evidence was obtained as a result of the delay at issue. There is no question that the police held off."

Murder Arrest Without Reasonable Grounds

The accused's submission that there was a second *Charter* breach when the detective re-arrested him for murder even though he did not have reasonable and probable grounds at the time was also rejected:

> Section 9 of the Charter provides protection against arbitrary detention. By itself, an arrest of

a person, when the arresting police officer recognizes that he lacks reasonable and probable grounds for that arrest, would constitute arbitrary detention by the authorities. However, in this case the [accused] was already under lawful arrest. When the [accused] was initially arrested for assault, the police had the requisite reasonable and probable grounds. When the detective re-arrested the [accused] for murder, the [accused] was not about to achieve an immediate state of liberty. ...

> "Section 9 of the Charter provides protection against arbitrary detention. By itself, an arrest of a person, when the arresting police officer recognizes that he lacks reasonable and probable grounds for that arrest, would constitute arbitrary detention by the authorities. However, in this case the [accused] was already under lawful arrest."

The detective testified that he advised the [accused] that he was under arrest for murder to bring home to the [accused] the full jeopardy he faced when he was questioned. The trial judge accepted the detective's evidence on this point. Presumably the [accused] advised his counsel that he was facing murder charges, and the counsel presumably provided advice with charges of murder in mind. Since ... s. 10(b) of the Charter has been interpreted as requiring police to generally inform persons being questioned of the jeopardy the person faces. This enables the person to make an informed decision regarding whether to speak with counsel and obviously enables counsel to tailor the advice given to meet the circumstances of the real jeopardy. If the police initially arrest a person for one charge, but then change the focus of their investigation towards a different and unrelated offence, or a significantly more serious offence, the police are required to advise the person of that change of focus and to re-state the person's right to counsel. [references omitted, para. 25]

The Court of Appeal concluded that a person is not arbitrarily detained when they are arrested for a second offence while already under lawful detention respecting another charge. "[A]lthough it would have been preferable that the detective waited to arrest the [accused] for murder after the detective had reasonable and probable grounds, no harm was done," said the Court. "The arrest for the murders left the [accused] with full knowledge of the crimes the police suspected he had committed and that he would be questioned with respect to those crimes. ... [I]n the context of a custodial detention, the purpose of s.10(b) of the Charter is to support the detainee's right to choose whether to cooperate with the police investigation or not, by giving him access to legal advice on the 'situation' he is facing. In this case there is no doubt that the [accused] knew the situation he was facing and was able to get advice regarding that situation before he was questioned by police."

s. 24(2) of the Charter

The Court of Appeal refused to overturn the trial judge's s.24(2) analysis. The accused had exercised his right to counsel before giving a statement, the statement was voluntary, there was no egregious police conduct, and no prejudice was shown. The charges were serious and the conscience of the community would be shocked if the statement was excluded. As for the re-arrest for murder, at most, this was a minor breach. The purpose of the arrest was to definitively bring home the jeopardy the accused faced.

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

Note-able Quote

"Every great leap forward in your life comes after you have made a clear decision of some kind." - Brian Tracy

EVEN IF NO REASONABLE GROUNDS TO ARREST, AMPLE EVIDENCE TO SUPPORT INVESTIGATIVE DETENTION

R. v. Dene & Telfer, 2010 ONCA 796

Police were engaged in proactive policing activity, attending a subsidized housing complex characterized as a high crime area in the city. Two officers went to a building within the housing complex intending to do a walk-through because of a deluge of recent drug complaints made by tenants - they were not responding to any specific call. This building was subject to frequent complaints of drug use, drug trafficking, prostitution, robberies, theft and trespass. The police also had a standing authorization to remove trespassers. The officers, in full uniform, arrived in their police car just before midnight and pulled into a parking lot at the rear of the building. One officer waited in the car while the other began walking towards the front door intending to enter the building. As the officer walked along the building, a taxi cab passed by with two male passengers wearing baseball caps and hooded sweat shirts. As the passengers sighted him, they ducked down out of sight. The cab continued in the parking lot and the passengers were seen peeking out through the back window at the officer, then ducking down again. The officer thought this behaviour was suspicious. The men were wearing hats and hoodies, appeared to be concealing their faces, ducked down and continually peeked out the back window.

The cab pulled into the parking lot, slowed as if to stop at the back door of the building, and then sped up to leave the parking lot. Because of the taxi occupants' actions, the time of day, and the area's reputation for crime, the police followed. They were focused on drug and trespassing possibilities and wanted to further observe and investigate the occupants. The cab slowed and the passengers peeked out the back. The officer activated the police lights, the cab slowed, and the occupants peeked out about three times before it stopped abruptly. Telfer, the passenger behind the driver got out of the cab, took a step towards the police car and then ran between the cruiser and the taxi, clutching his pocket with his hand in a way that made the officer feel he had a weapon. The officer believed at that time he had reasonable grounds to make an arrest for firearms possession. The officer chased Telfer into a building's basement, tackling, handcuffing, and patting him down for safety, finding a loaded gun in his pocket. Telfer was taken back to the police car, searched again, and advised of the reason for arrest. Crack cocaine, cash, and three cell phones were found.

While Telfer was being chased, Dene awkwardly exited the cab. He turned his body in a manner that allowed him to close the door with his left hand while keeping the right side of his body shielded and very stiff. The officer said Dene was "blading" - a technique for moving while physically trying to conceal a gun or drugs. Dene also ran, his arm stiffly holding his side, but was tackled by the officer. Dene was handcuffed and informed he was under arrest. A cursory search revealed a gun in his pants and a further search at the police car turned up live ammunition. Between Dene and Telfer, two loaded guns, a .38 and a .45, ammunition, 20.3 grams of cocaine, $170, and 3 cell phones were found. They were charged with multiple counts relating to guns, drug possession, and breaches of probation and prohibition orders.

At trial in the Ontario Superior Court of Justice the judge found there was no restrictive or sustained display of police conduct in stopping the cab as to support the conclusion that the police had crossed the line and detained its occupants. And before this simple stop turned into an investigative detention the accuseds ran. This flight gave police reasonable grounds to conclude the accuseds were carrying drugs or weapons or both. "While the events occurred beforehand did not give rise to such ground, once Telfer clutched his pockets and Dene started blading away from the site, obviously attempting to conceal weapons, narcotics or both, the totality of the circumstances gave the officers cause to affect an arrest," said the judge. "The police figured the cab would stop or at least the lights indicated a command to stop, but both accused ran.

They were not detained while they were running away. The way each of them ran and grabbed their clothing indicated to the police they had weapons and the police had reasonable and probable grounds to make an arrest, let alone detain them. The lack of an arbitrary detention coupled with reasonable and probable grounds created by the manner in which the accused left the scene and clutching their clothing indicates that the arrest was lawful. Although the take-down was physical, it was reasonable considering the flight of the accused and the serious threat to the officer's safety." Even if there was an arbitrary detention, the drugs, guns and ammunition were admissible under s. 24(2). The accuseds were convicted and Telfer was sentenced to 8 years while Dene was given 5 1/2 years (before credit for pre-trial custody).

The accuseds then appealed to the Ontario Court of Appeal submitting that their ss. 8 and 9 *Charter* rights were breached and the evidence that they were carrying handguns should have been excluded under s. 24(2). In their view, the police did not have reasonable and probable grounds for their arrest and were therefore not entitled to conduct the personal searches. Even assuming, without deciding, that the police did not have reasonable grounds to arrest, there was still ample evidence to support a valid investigative detention of both accuseds found the Ontario Court of Appeal:

> Their behaviour in the taxi was suspicious and evasive. Their posture and body movements indicated that they could be carrying concealed weapons or drugs. Finally, and most significantly, their flight from the police when the taxi stopped, combined with their earlier behaviour, provided the police with grounds for an investigative detention. [para. 4]

The "pat down" search of Telfer and the "cursory" search of Dene both fell within the category of "a protective pat-down search of the detained individual" to ensure officer safety that is permitted in the context of an investigative detention. Even if the searches exceeded the scope of a permissible search in the context of an investigative detention, the evidence should not be excluded under s. 24(2). "Putting the [accuseds'] case at its highest, the searches barely exceeded the permissible limits," said the Court. "The Charter-infringing state conduct was not serious; the impact of the breach on the Charter-protected interests of the [accuseds] was minor; and the state's interest in adjudication of the case on the merits is high."

The accuseds' appeals were dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Facts and Ontario Superior Court of Justice reasoning taken from the judgment *R. v. Dene,* [2010] O.J. No. 5193.

2008 'EVIDENCE TO THE CONTRARY' AMENDMENTS OPERATE RETROSPECTIVELY

R. v. Gartner, R. v. Houde, R. v. Bykowski, 2010 ABCA 335

The Alberta Court of Appeal has ruled that the 2008 amendments to s. 258 of the *Criminal Code* have retrospective effect. These amendments limit the type of evidence that can be used to establish "evidence to the contrary" to rebut the blood alcohol readings given by approved instruments. Each of the three accuseds were charged with excessive blood alcohol levels while driving prior to the amendments coming into effect. But they were all tried in whole or in part after the amendments came into effect. All three of the Alberta Provincial Court trial judges found the amendments to be substantive and therefore did not have retrospective effect. In all three cases, however, an Alberta Court of Queen's Bench judge disagreed on appeal and reversed the trial decisions and ordered new trials. All three accused then unsuccessfully appealed to the Alberta Court of Appeal. Justice Slatter, in a short memorandum of judgment for the Court, concluded that the 2008 amendments did not remove any substantive defence and merely specified the type of evidence that would be sufficient to raise a reasonable doubt about the blood alcohol level of an accused:

> The recognition of "evidence to the contrary" was never a true "defence", but rather was the

> recognition of evidence that would rebut or displace the presumptions of identity and accuracy in the Code. Those presumptions were themselves evidentiary in nature. The Code provided that the readings on the instrument were accurate evidence of blood alcohol at the time of the driving, unless other evidence displaced those presumptions. The 2008 amendments merely changed the type of evidence that could displace the evidentiary presumptions arising from the instrument readings. Just because convictions might now result where acquittals might previously have been entered does not make the changes substantive. [para. 2]

All three appeals were dismissed.

Complete case available at www.albertacourts.ab.ca

AMENDMENTS STRENGTHENING BREATHALYZER PRESUMPTIONS RETROSPECTIVE

R. v. Truong, 2010 BCCA 536

The accused was stopped in a roadblock. He was exhibiting a strong odour of alcohol, a flushed face, watery eyes, and slurred speech. She failed a roadside screening device test and breath samples into an approved breathalyzer instrument were demanded. Her breathalyzer readings were 140mg% and 135mg% and she was charged with impaired driving and over 80mg%.

At trial in British Columbia Provincial Court the accused led evidence of her pattern and quantity of drinking prior to being stopped. The accused and her friend testified that between 3:00 p.m. and 11:30 p.m. she consumed about one bottle of wine with an alcohol content of 11.5%. A defence toxicology expert interpreted the effects of the alcohol on the accused and gave an opinion as to her expected blood alcohol readings at the time of driving. The expert testified that the accused's blood alcohol level at the time she was stopped at the roadblock would be in the range of 10mg% to 40mg %. The trial judge found that the 2008 *Criminal Code* amendments that strengthened the presumptions applying to breathalyzer evidence in the prosecution of impaired driving and over 80mg % offences operated only prospectively, not retrospectively. The alleged offences in this case occurred before the amendments became law but her trial took place afterwards. The accused was acquitted on both counts. First, the judge had a reasonable doubt that that the accused was impaired when she was stopped. Second, on the over 80mg% charge, he found the defence evidence established that the breathalyzer readings were unreliable. The evidence adduced was sufficient to constitute evidence to the contrary and the presumption of accuracy that the accused's blood alcohol at the time of driving exceeded the legal limit was rebutted. On appeal by Crown, a British Columbia Supreme Court justice ordered a new trial after concluding that the 2008 amendments were also retrospective. An appeal by the accused was then brought before the British Columbia Court of Appeal.

Under the 2008 amendments, evidence of the breathalyzer analysis is conclusive proof of blood alcohol concentration unless there is evidence tending to show all of the following three things:

1. the approved instrument was malfunctioning or was operated improperly,

2. the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80mg %, and

3. the concentration of alcohol in the accused's blood would not in fact have exceeded 80mg% at the time when the offence was alleged to have been committed. (s. 258(1)(c) Criminal Code)

Furthermore, evidence tending to show that an approved instrument was malfunctioning or was

Prospective = concerned with or applying to the future.

Retrospective = directed to the past; contemplative of past situations.

operated improperly, or that an analysis of a sample of the accused's blood was performed improperly, does not include evidence of:

- the amount of alcohol that the accused consumed,
- the rate at which the alcohol that the accused consumed would have been absorbed and eliminated by the accused's body, or
- a calculation based on that evidence of what the concentration of alcohol in the accused's blood would have been at the time when the offence was alleged to have been committed. (s. 258(1)(d) *Criminal Code*)

As well, the results of the analysis showing a concentration of alcohol in blood exceeding 80mg % is proof that the concentration of alcohol in the accused's blood at the time when the offence was alleged to have been committed exceeded 80mg%, in the absence of evidence tending to show that the accused's consumption of alcohol was consistent with both:

- a concentration of alcohol in the accused's blood that did not exceed 80mg% at the time when the offence was alleged to have been committed, and
- the concentration of alcohol in the accused's blood at the time when the sample or samples were taken. (s. 258(1)(d.1) *Criminal Code*)

These amendments were enacted by Parliament to limit the available evidence that would rebut the blood alcohol testing results obtained by the operation of an approved breathalyzer instrument:

> If it is the intention of an accused to attack the accuracy of the breathalyser readings, the effect of the amendments is to require her to directly challenge the condition of the breathalyser instrument itself, the viability of the chemical solutions used in its operation, the qualifications of the operator or the actions of the operator in conducting the tests in question. Otherwise, the statutory presumption as to the blood alcohol reading of the accused at the time of driving will prevail. As a matter of law under the amendments, evidence to the contrary cannot consist only of evidence of the accused's alcohol consumption and rate of elimination together with the opinion evidence of a toxicologist. Such evidence is precluded from being considered as evidence of a problem with the approved instrument or its use. The science involved can be attacked only directly.
>
> It might be that the accused wishes to provide evidence that, the breathalyser readings notwithstanding, her blood alcohol level was below .08 at the time of driving because of bolus drinking (drinking so soon before driving that the she had not yet absorbed the alcohol to a level over .08), or because of post-driving drinking. Section 258(1)(d.1), as amended, permits the accused to show that the readings were correct when taken but do not reflect the blood alcohol level at the time of driving because of one or the other of these scenarios. This approach does not amount to an attack on the condition of the approved instrument or its operation. [paras. 9-10]

Justice Low, speaking for the unanimous Court of Appeal, found the amendments only go to matters of proof and therefore were evidentiary. They did not eliminate a defence. The amendments simply modified the way in which an accused could challenge the breath results:

> It remains open to an accused to challenge the reliability of the breathalyser readings and to present evidence tending to show a drinking quantity and pattern that could not have yielded a blood alcohol level over .08. The only change is that she can no longer present evidence on either basis alone. She must present evidence on both in order to raise a reasonable doubt as to whether her level was above the legal limit at the critical time, unless she is able to present evidence to which the present s. 258(1)(d.1) would apply (bolus or post-offence drinking). [para. 20]

The amendments therefore had a retrospective application. The accused's appeal was dismissed and the order for a new trial was confirmed.

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

CORROBORATED ANONYMOUS TIP PROVIDES JUSTIFICATION FOR ARREST

R. v. Jir, 2010 BCCA 497

Two plainclothes police officers driving an unmarked vehicle received a message via police computer from a dispatcher at 9:43 pm advising them of a just-received anonymous tip. The tip reported that a 2007 red Chrysler Sebring motor vehicle with a particular licence plate would be arriving at a church at the corner of a particular location in approximately 15 minutes with drugs that were going to be smuggled across the border into the United States. A licence plate check determined that the Sebring was registered to an address in a different city. At 9:58 pm the officers drove to the location of the church, located in a rural area directly north about "one country block" of the Canada/U.S. border. They saw the Sebring described in the tip turning into the driveway of a church parking lot. Police turned into the parking lot, stopped the vehicle, and arrested the driver. The vehicle was searched and three duffle bags were found in the trunk. The bags contained a total of 24 vacuum-packed packages, each package holding five baggies, each of which contained 1000 ecstasy tablets (a total of 120,000 tablets).

At trial in British Columbia Provincial Court the accused submitted that the information provided in the anonymous tip did not provide objective reasonable grounds. The trial judge, however, ruled the arrest lawful under s. 495(1)(a) of the *Criminal Code*, did not breach the accused's s. 9 *Charter* right, and that the search that followed was also reasonable under s. 8. And even if the grounds for the arrest did not exist, the trial judge would have admitted the evidence under s. 24(2).

The accused then appealed to the British Columbia Court of Appeal again submitting the lack of reasonable grounds for the arrest. Although he accepted that the officer had the necessary subjective belief in reasonable grounds for a warrantless arrest, he contended that the factual matrix which informed the officer's decision did not satisfy the objective reasonable grounds standard.

Under s. 495(1) of the *Criminal Code* an arresting officer must subjectively have reasonable rounds on which to base an arrest. Those grounds must also be justifiable from an objective point of view - a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable grounds for the arrest. There is no need, however, for the police to demonstrate anything more than reasonable grounds. It does not reach the standard of a *prima facie* case for conviction and is also less than the civil standard of proof. In making an objective reasonable grounds assessment a trial judge must be careful to not conflate aspects of the testimony of different officers. In this case, the trial judge included in her consideration the fact that another police officer was aware of previous attempts to throw drugs across the border in this area. But this evidence was not given by the arresting officer and was not something the judge should have considered in determining whether the officer's grounds were objectively reasonable.

Reasonable Grounds for Arrest

In assessing whether reasonable grounds exists on the basis of an anonymous tip, Justice Frankel, speaking for the majority, stated:

> It is well established that a reasonable grounds determination involves a consideration of the "totality of the circumstances". When the police act on the basis of an anonymous tip, consideration must be given to a variety of factors, including the degree of detail provided by the tipster, information as to the tipster's source of knowledge, and indicia of the tipster's reliability, including confirmation of some of the information provided. Weakness in one area may be compensated for by strengths in other areas. [references omitted, para. 28]

The accused submitted the arresting officer did not have reasonable grounds because he did not know the identity of the tipster, did not know how many persons would be in the Sebring, did not know the identity of the person or persons in the Sebring, or did not know the nature and amount of the drugs involved or how it was packaged. In his view, the police should have conducted surveillance of the Sebring to see whether it drove towards the border

or was met by another vehicle. But this was rejected. Had this other information been available it might have strengthened or weakened the grounds but it was not a relevant consideration. What mattered was whether the officer had objectively reasonable grounds at the time he made the decision to arrest. The officer was told "that an anonymous tipster had reported that a particular vehicle (registered to an address in Vancouver) would be coming to a particular place in a rural area of Abbotsford at a particular time of night, for the purpose of smuggling drugs across the nearby border. The officer then observed that vehicle arriving at that place at that time." Justice Frankel continued:

> In my view, [the officer's] belief that he had the grounds necessary to arrest [the accused] was objectively reasonable. The highly-specific information provided by the tipster with respect to vehicle, place, and time had been confirmed. This lent credence to the tip and made it likely that the tipster had personal knowledge of what he or she had reported. That events unfolded as the tipster said they would bolstered the reliability of the aspect of the tip pertaining to the Sebring being used for drug-related activity. In addition, there did not appear to be any reason for the Sebring to have pulled into the church parking lot at that time of night. [para. 31]

Since the accused had been lawfully arrested the vehicle was lawfully searched incidental to that arrest and the question of whether the drugs should be excluded under s. 24(2) of the *Charter* did not arise.

"When the police act on the basis of an anonymous tip, consideration must be given to a variety of factors, including the degree of detail provided by the tipster, information as to the tipster's source of knowledge, and indicia of the tipster's reliability."

A Second Opinion

Justice Groberman was not persuaded that the officer had objective reasonable grounds to believe that the accused had committed an indictable offence. Therefore, the requirements of s. 495 of the *Criminal Code* had not been met. "The information that [the officer] had at the time of arrest was simply that an unknown person (the 'tipster') had stated that a particular vehicle would arrive at a particular place at a particular time, and that the vehicle was carrying drugs that would be smuggled over the international border," he said. "[He] had no information as to the identity or reliability of the tipster, the source of the tipster's information, or the tipster's relationship with the vehicle's driver or with the alleged trafficking operation. The tip was confirmed only to the extent that the vehicle showed up at the place and time the tip predicted." He continued:

> In my view, the mere fact that a completely anonymous tipster was able to say that a particular vehicle would be at a place at a particular time was not sufficiently corroborative of the tip to give the officer reasonable grounds to believe that the accused was committing a crime. [paras. 45]

Although the information the officer had came very close to justifying an arrest, Justice Goberman found it nonetheless fell slightly short of providing objective reasonable grounds to believe that the accused was committing or was about to commit a crime. But he held that there were reasonable grounds to suspect that the accused might be involved in crime and therefore the officer was justified in stopping him and asking questions about why he was in the area and what he was doing (investigative detention). If the answers added to the officer's suspicions then grounds for an arrest might well have been reached. The officer might also have chosen to conduct surveillance, which may have developed additional evidence of suspicious circumstances. Since the arrest was unlawful the subsequent search of the vehicle (trunk) could not be justified as a search incidental to arrest. But like the trial judge, Justice Groberman found the evidence admissible under s.24(2).

The accused's appeal was dismissed.

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