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

IN SERVICE:10-8

A PEER READ PUBLICATION

JUSTICE INSTITUTE of BRITISH COLUMBIA

A newsletter devoted to operational police officers across British Columbia.

IN MEMORIAL

On September 8, 2008 Laval Police Constable Éric Lavoie succumbed to injuries sustained three years earlier when he was involved in an automobile accident while responding to an emergency call.

His patrol car left the roadway and struck a concrete barrier, leaving him paralyzed. He died of complications from his injuries.

Constable Lavoie had served with his agency for 9 years. He is survived by his wife and child.

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

CLOSING A GAP

More than 15 years ago B.C.'s Attorney General of the day, the Hon. Colin Gabelmann, appointed then Supreme Court Justice Wallace Oppal (now Attorney General), to conduct a Commission of Inquiry Into Policing in British Columbia. As a result of the inquiry a two volume report entitled *"Closing the Gap: Policing and the Community"* was released in 1994 with 317 recommendations. Some of these recommendations have been acted on, while others remain unanswered.

One area the Commission examined was on-going police training. In the report, the Commissioner noted that "police officers need better training and more resources so that they will fully understand what is required of them and how to enforce the law while upholding citizens' rights." As a consequence, the Inquiry recommended that "the Law Enforcement Branch ... designate a source of legal information for police to use on a regular basis." (Recommendation 220) "In Service: 10-8" has tried to do just that.

OFFICERS PAY TRIBUTE TO FALLEN

On Sunday September 28, 2008 hundreds of law enforcement officers from Canada and the United States attended a memorial service at Peace Arch Park located between the Canada and U.S. border crossing to honour fallen peace officers.

They are our heroes. We shall not forget them.

HIGHLIGHTS IN THIS ISSUE

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

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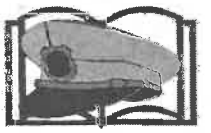
'IN SERVICE: 10-8' e-LETTERS TO THE EDITOR



"[Your newsletter] was recommended to me by a fellow officer, and I've had a look at the latest issue. It looks like a great newsletter and would no doubt be very helpful in my line of work." - **Investigations Officer, Ministry of Environment, Ontario**

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"My service is pretty good about trying to keep our web site updated with the most up to date issue, but I sometimes find that I get caught up with other work and need to be reminded to stay on top of things. This method is a better solution for me. ... I appreciate the publication and find it to be very informative." - **Police Detective, Ontario**

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"I was recently introduced to your newsletter by a colleague, and have now read a current one and a few old ones on-line. This is an excellent publication. ... I work in the Training Unit of our department and this information would be very useful when designing training that is meant to challenge our officers with current issues." - **Police Constable, Ontario**

****

"Another great issue of 10-8 as always. I really like the legal updates as they keep me current on case law. Keep up the good work." - **Police Sergeant, British Columbia**

****

"I think you are doing a great job in providing these articles to Officers. ... I find them very informative and would like to be added to your E mail list." - **Police Detective, Ontario**

****

"As a Military Police Detachment, we find the information contained within your newsletter to be valuable and a very interesting read, especially for our younger members." - **Master Warrant Officer, Military Police, Canada**

www.10-8.ca

LEGALLY SPEAKING:

Party to an Offence

"Section 21(1)(b) of the Criminal Code provides that everyone is a party to an offence who "does or omits to do anything for the purpose of aiding any person to commit it." Liability as a party therefore requires an intent to assist the principal, which in turn requires knowledge of the principal's intent to commit an offence ... Knowledge of the precise details is not necessary, so long as there is an awareness of the type of crime intended to be committed ... However, simply standing by and watching a crime being committed, even [a murder], is not an offence." - Alberta Court of Appeal Justice Martin, *R. v. Briscoe*, 2008 ABCA 327, at para. 11, references omitted.

NATIONAL DO NOT CALL LIST

Did you know that recent amendments to Canada's *Telecommunications Act* allows the Canadian Radio-television and Telecommunications Commission to establish a national "Do Not Call List"? This will reduce the volume of unwanted telemarketing calls Canadians receive at home. Sign up is easy. Simply log into the web site and register your telephone number(s).

www.lnnte-dncl.qc.ca

IN-SERVICE LEGAL ROAD TEST

The "In Service" Legal Road Test is a simple multiple choice quiz designed to challenge your understanding of the law. Each question is based on a case featured in this issue. See page 30 for the answers.

1. When detaining someone while investigating a crime, it is not necessary for the officer to pinpoint the crime with absolute precision.
   (a) True
   (b) False

2. When complying with the informational requirement of s.146(2)(b) of the *Youth Criminal Justice Act* (language appropriate to age and understanding), police must always have the young person recite back their rights as understood.
   (a) True
   (b) False

3. When the police obtain breath samples in the absence of reasonable grounds to make a breathalyzer demand, the certificate of analysis will automatically be excluded.
   (a) True
   (b) False

4. When a person provides police with valid consent to intrude upon their privacy interests, there is no "search", as the word is defined for *Charter* purposes, and s.8 is therefore not engaged.
   (a) True
   (b) False

5. A physical detention does not depend on the intention of the police but on their actions in directing or taking control of the person.
   (a) True
   (b) False

6. A "psychological detention" occurs when the police give a demand, such as "Stop. Police!", even if the person does not comply and flees.
   (a) True
   (b) False

www.10-8.ca

BRITISH COLUMBIA: STILL CANADA's MOST EXPLOSIVE PROVINCE

According to data released by the Canadian Data Centre, Canada had a total of 198 explosive incidents in 2007. British Columbia ranked tops among incidents, improvised explosive device recoveries, and explosives recoveries.

The following definitions will help explain the incidents reported in the table below.

Incidents - The number of times Explosives Disposal Units were called to scenes involving the possible use of explosives.

Bombings - Explosions of devices created for non-authorized or criminal use that occurred at incidents attended by Explosives Disposal Units.

Attempted Bombings - Incidents attended by Explosives Disposal Units involving the use of one or more improvised explosive devices that failed to function because of an unintentional defect in design or assembly.

Hoax Devices - Incidents attended by Explosives Disposal Units where devices constructed from inert or non-explosive components were intended to resemble actual bombs.

Improvised Explosive Device (IED) - A bomb created for non-authorized use.

Recovered IEDs - Number of IEDs, that were recovered by Explosives Disposal Units. At one incident, one or more IEDs can be recovered.

Explosive Thefts - Incidents attended by Explosives Disposal Units that involved reporting stolen explosives materials, the flammable component bombs.

Explosive Recoveries - Incidents where Explosives Disposal Units recovered explosive materials that were armed, dumped, stolen or suspected to be connected with unlawful activities.

Province / Territory	Incidents	Bombings	Attempted Bombings	Hoax Devices	Recovered IEDs	Explosive Thefts	Explosives Recoveries	Accidental Explosions
British Columbia	48	-	1	4	17	-	25	1
Alberta	7	1	1	2	1	1	1	-
Saskatchewan	2	-	-	-	1	-	1	-
Manitoba	7	-	-	1	1	-	5	-
Ontario	26	4	1	5	4	-	12	-
Quebec	30	4	1	6	8	1	10	-
New Brunswick	42	8	1	9	1	-	23	-
Nova Scotia	27	-	-	5	3	-	18	1
Prince Edward Island	2	-	-	2	-	-	-	-
Newfoundland	5	-	-	1	-	1	3	-
North West Territories	2	-	-	-	-	-	1	-
Yukon	-	-	-	-	-	1	-	-
Nunavut	-	-	-	-	-	-	-	-
Canada	198	17	5	35	36	4	99	2

Source: Canadian Bomb Data Centre available at www.rcmp-grc.gc.ca/techops/cbdc/stat_theft_e.htm (accessed July 30, 2008).

INTERVIEWEE NOT UNDER DETENTION: s.10(b) NOT ENGAGED

R. v. Azzam, 2008 ONCA 467

The accused's step-mother was stabbed to death and her body was found beside her vehicle in the parking lot of a community centre. A woman who lived near the parking lot had seen a man run out of the lot and ride away on a bicycle. Her description of the man was generally consistent with the accused's. Police placed the victim's residence under surveillance and the accused and his girlfriend had been seen there. Because he matched the general physical description given by the witness, the investigating detective directed other officers to surveil the accused, but not to approach him unless he appeared to be leaving the area, in which case the detective would attend and advise the accused that the body discovered was believed to be his step-mother.

Detectives arrived at the victim's home and found the accused and his girlfriend sitting on the front porch. They were told of step-mother's death and were asked and agreed to attend at the police station for a video taped interview. This type of interview was standard practice and designed to obtain background information about the victim and her whereabouts in the days preceding the death. The accused's girlfriend was interviewed first and said the accused had been home all night.

Before interviewing the accused detectives believed they did not have reasonable and probable grounds to arrest him. They classified him as being a person of interest and would stop the interview, arrest the accused, and give him his right to counsel if anything was said during the interview to provide reasonable grounds. The accused initially denied having seen his step-mother at the relevant time so a detective lied to him, advising a witness had "picked him out" of a photo line-up, to see if he would change his story. The witness had been shown a photo line-up with the accused but did not pick him out. The detective also asked if the accused would provide a DNA sample, which was a standard request in these types of cases. He agreed and also consented to a search of the house.

After about 45 minutes the accused admitted he had been at the community centre and talked to his step-mother, but left her alive. The interview was terminated and he was arrested and given his rights to counsel and arrangements were made for him to speak to counsel by telephone. He subsequently admitted to killing the victim.

In the Ontario Superior Court of Justice the judge denied the accused's pre-trial application to exclude his first statement to police because the police breached his rights under s.10(b) of the *Charter*. In the trial judge's view the accused had not been detained at the time of his first interview and therefore s.10(b) was not triggered. He did not testify on the application but the police did. Detectives said the accused was free to leave the police station at any time and they did not give any demands or directions that would inhibit his freedom. There was no evidence the accused was "psychologically" detained in that he acquiesced to a demand or direction. The accused then appealed the trial judge's ruling on s.10(b), among other holdings, to the Ontario Court of Appeal. Justice Glithero, writing the Court's opinion, agreed with the trial judge. He stated:

> "[T]he questioning was part of a general investigation, as opposed to police questioning for the purpose of obtaining incriminating statements from a person the police had decided to be responsible for the crime."

> The fact that the physical description given by [the witness] only generally matched the [accused], the fact that she had subsequently failed to pick his photograph out of a line up, and the alibi evidence given by [his girlfriend] on behalf of the [accused] strongly support the trial judge's finding that the police did not have reasonable and probable grounds to charge or arrest the [accused] prior to the interview. There was ample evidence upon which the trial judge could conclude that the questioning was part of a general investigation, as opposed to police questioning for the purpose of obtaining incriminating statements from a person the police had decided to be responsible for the crime. [reference omitted, para. 28]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

BURDEN ON DETAINEE TO ESTABLISH DILIGENCE IN EXERCISING RIGHT TO COUNSEL

R. v. Taylor, 2008 ABCA 253

At about 12:30 a.m. two witnesses held the highly intoxicated accused for police after they saw him "rubbing" vehicles in a car lot and standing near some damaged cars. He was arrested, cautioned, and given the opportunity to call a lawyer. He made a seven minute call, but the officer did not confirm he talked to counsel. It was later discovered he called his mother, not a lawyer. He was then detained overnight in the drunk tank.

The following morning police interviewed him. After the interviewing officer reviewed a warned statement checklist, the accused checked off the boxes indicating he understood that he did not need to say anything, that he did not wish to call a lawyer, and that he waived his right to receive legal advice at that time, but could invoke it later. Approximately two-thirds of the way through the interview, the accused asked to speak to a lawyer, saying, "Yeah, I wanna go to a lawyer, talk to my lawyer or something". The officer interpreted the accused's response as meaning that he would contact a lawyer at a later date. The accused's statement was largely exculpatory. He said a friend told him that there were damaged vehicles in the lot and he was just there checking it out by touching the scratches with his hand. He was released on a promise to appear.

The police received reports of more extensive vehicle damage at another car lot and the accused was re-arrested within two hours of his release. He was again advised of his right to counsel, indicated that he understood, and said he did not want to talk to a lawyer. Near the end of the interview, the accused provided a statement where he admitted to damaging vehicles at three different locations.

During a *voir dire* in Alberta Provincial Court his statements were admitted. The trial judge found the accused was told clearly in the video recorded statements that he could stop at any time if he wanted to see or talk to a lawyer, which the accused acknowledged. But he had a duty to make it clear that he wanted to exercise that right. The judge found the officer could not read the accused's mind and his statement "Yeah, I wanna go to a lawyer, talk to my lawyer or something" did not amount to a request to speak to a lawyer. The police carried out their obligations and there was no *Charter* breaches. The accused was convicted on four charges of mischief under $5,000 and two charges of mischief over $5,000 involving the "keying" or scratching of 115 cars in three locations causing almost $400,000 in damage.

The accused then appealed to the Alberta Court of Appeal arguing, among other grounds, that his s.10(b) *Charter* right was violated. He submitted the officer continued to question him during the first interview even though he asked to contact counsel. And this violation affected his decision to contact a lawyer prior to the second interview because he believed that he would be questioned regardless of whether he asked to speak to a lawyer. The second statement, he contended, should not have been admitted.

The Court of Appeal first noted the duties imposed on the police with respect to s.10(b):

> The obligations of the police in relation to a detainee under s. 10(b) are (a) to advise of the right to counsel (the informational duty); (b) if the detainee indicates a wish to contact counsel, to provide an opportunity to do so; and (c) during that time, desist from questioning (the implementational duties). If the detainee is informed of the right to counsel, but it does not exercise it, the onus is on the detainee to show why it was not exercised. A detained person must be reasonably diligent in exercising the right to counsel, and the burden is on the detainee to establish diligence. [references omitted, para. 16]

"The obligations of the police in relation to a detainee under s. 10(b) are (a) to advise of the right to counsel (the informational duty); (b) if the detainee indicates a wish to contact counsel, to provide an opportunity to do so; and (c) during that time, desist from questioning (the implementational duties)."

In this case, the Court found the informational duty imposed on police had been met and the accused had waived his right to counsel at the beginning of both interviews. The trial judge had accepted the officer's testimony that he interpreted the accused's statement, "Yeah - I wanna go to a lawyer,

talk to my lawyer or something," as meaning that the accused wanted to speak to a lawyer at some future date. And even if the accused should have been given an opportunity to call a lawyer during the first interview when he said this, the first statement was exculpatory. When the accused was re-arrested, he was again informed of his right to counsel, which he waived.

No *Charter* breach occurred during the first interview and therefore it was unnecessary to determine whether the second interview, which resulted in an inculpatory statement, was tainted.

The accused's appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

INVESTIGATIVE DETENTION: NO NEED TO PINPOINT CRIME WITH ABSOLUTE PRECISION

R. v. Nesbeth, 2008 ONCA 579

At about 11:00 p.m. six Anti-Violence Intervention Strategy police officers, whose purpose was to reduce violence and increase safety, went to an apartment complex plagued by drug use, drug sales, robberies, guns and gang violence. They had the consent of the landlord to attend at the complex to enforce Ontario's *Trespass to Property Act*. After splitting into three teams, each team walked up one of three stairwells. One team immediately detected a strong odour of freshly smoked marijuana and when they reached the 9th floor landing the door opened and the accused entered. He seemed surprised when he saw the officers and immediately, very tightly clenched the knapsack he was carrying. An officer asked the accused, "Hey buddy, what are you doing?" He replied, "Oh shit", turned around, opened the door, and began to run away. The officers ran after him across the 9th floor. The accused grabbed a shopping cart and attempted to knock it over in front of one of the pursuing officers while they repeatedly yelled, "Stop, police."

The accused ran to another stairwell and ran down the stairs while he threw his knapsack down, which was retrieved by police. He was caught up to on the 7th floor and tackled to the ground. The knapsack was opened and inside police found 680 grams of cocaine, two digital scales and three cell phones. The detaining officer then arrested the accused for possessing cocaine for the purpose of trafficking and searched him, finding $1,720 in cash. He was charged with possessing cocaine for the purpose of trafficking, possessing proceeds of crime, and failing to comply with the terms of a recognizance.

At trial in the Ontario Court of Justice the judge concluded that the accused's *Charter* rights were breached. He found the police were unable to provide an articulable cause for their "attempt to detain the accused" when they uttered the words, "stop, police"—a command with which the officer expected the accused to comply. The odour of marihuana, the accused appearing startled, swearing, and running, all occurring in a high crime area was suspicious, but did not constitute articulable cause to believe a crime had occurred or was occurring. Thus, the accused was arbitrarily detained contrary to s.9 of the *Charter* when the police attempted to detain him based only on suspicion and hunch. The police were not justified in chasing and tackling the accused. Further, the trial judge held that there were no grounds for arrest.

The trial judge also found "there were no extrinsic circumstances to warrant the opening of the knapsack" and the officers "knew they were not dealing with lost property or abandoned property in the classic sense that someone puts something out curbside for the garbage". The search of the backpack was held to be an unreasonable search and seizure under s. 8. All of the evidence found by the police—the cocaine and cash—was excluded and the accused was acquitted.

The Crown then successfully appealed to the Ontario Court of Appeal. Justice Rosenberg, writing the unanimous judgment of the Appeal Court, found the police did not breach the accused's *Charter* rights.

Detention

Justice Rosenberg first recognized that police have a limited power of investigative detention to assist them in carrying out their duties and must be able to respond quickly and effectively when faced with a rapidly evolving situation. "A police officer may briefly detain an individual for investigative purposes 'if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is

necessary'", said Justice Rosenberg. "Such a detention will not violate s. 9."

In this case, the trial judge was correct in concluding that the police did not have grounds to detain the accused when they initially encountered him, but erred in finding the accused was detained when police initiated the chase and told him to stop. A person can be detained by police physically or psychologically. Psychological detention occurs when the police give a direction or demand and the person voluntarily complies with the direction or demand resulting in the deprivation of their liberty. Here, the accused was not physically detained when the chase began nor was he psychologically detained. He never submitted to authorities. Justice Rosenberg said:

> [W]hile there was a demand: "Stop, police", the element of compliance with the demand was missing. Far from complying, the [accused] made it abundantly clear that he had no intention of being detained. While the police obviously intended to detain the [accused] after he began to flee, ... "Intention alone does not attract a finding of unconstitutionality." Thus, there was no detention at the start of the pursuit.
>
> In my view, the [accused] was not detained until he was tackled at the end of the chase. The validity of that detention had to be measured by the facts known to the police at that time. Those facts included the following:
>
> - The [accused] had immediately bolted when he saw the uniformed officers.
> - He used some force in an attempt to impede the officers' progress by throwing a shopping cart in their way.
> - He threw away a knapsack that he had been tightly holding up until then.
> - It was late at night, and the [accused] was in the stairwell of a building known to be a high-crime area.
>
> This constellation of factors was sufficient to give the police officers reasonable grounds to suspect that the [accused] was involved in criminal conduct. These were not the actions of a mere trespasser. While the court in Mann speaks of reasonable grounds to suspect that the individual is connected to "a particular crime", in my view, it is not necessary that the officers be able to pinpoint the crime with absolute precision. Given the [accused's] behaviour in relation to the knapsack and the desperation with which he fled the police, the police could reasonably suspect that he was in possession of contraband: either drugs or weapons or both. They were therefore entitled to detain him for investigation in accordance with Mann. [paras. 16-18]

"The validity of [the] detention had to be measured by the facts known to the police at that time."

"While the court in Mann speaks of reasonable grounds to suspect that the individual is connected to "a particular crime", in my view, it is not necessary that the officers be able to pinpoint the crime with absolute precision."

Thus, although the police did not have grounds to detain when they initially encountered the accused and began the chase, his subsequent actions provided the necessary grounds to detain him.

And even though none of the police officers actually articulated why they detained the accused (their grounds for doing so), a court "is entitled to draw reasonable inferences from the circumstances." Here Justice Rosenberg found that the officers not only objectively had reasonable grounds to detain the accused, but that subjectively, it was apparent that they believed that they had grounds to detain by the time the chase ended, even though they never expressly articulated their subjective belief as to those grounds.

Since the accused was not detained during the chase, his s.9 rights were not triggered. Once he was tackled he was detained, but the police had by then acquired the requisite grounds for the detention.

Search

Justice Rosenberg also ruled the trial judge erred in holding the seizure and opening of the knapsack without a warrant was unreasonable under s.8 of the *Charter* because the accused did not have a reasonable expectation of privacy in the knapsack at the time the police seized and opened it. By throwing his knapsack away, the accused abandoned any reasonable expectation of privacy in it and its contents. He stated:

> Far from having possession or control of the knapsack, the [accused] attempted to divest himself of possession and control. He gave up the ability to regulate access to the property when he threw it

away. Finally, he offered no evidence of any subjective expectation of privacy; to the contrary, the trial judge accepted that the [accused] intentionally threw the knapsack away, which suggests that he was no longer interested in exercising any privacy interest in the knapsack.

... By his conduct in intentionally throwing away the knapsack, the [accused] had precluded himself from relying on the s. 8 protection.... [paras. 22-23]

Since the accused did not have a reasonable expectation of privacy his s.8 rights were not engaged. The police therefore did not violate the *Charter* by opening the bag and discovering the contraband inside it. Once the bag was opened and drugs found, the police had reasonable grounds to arrest the accused and search him as an incident to the arrest. They then found the cash which resulted in the possession of proceeds of crime charge.

The Crown's appeal was allowed, the accused's acquittals were set aside, and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

HIT & RUN APPLIES TO SINGLE VEHICLE MVA WITH INJURED PASSENGER

R. v. McColl, 2008 ABCA 287

The accused left a house party at about midnight with three passengers to buy more beer. All four had been consuming alcohol. While driving down the wrong way on a divided street, his truck swerved and struck a tree. Everyone was injured. The accused left the scene without offering assistance while the three passengers made their way to a nearby convenience store where EMS was called. The accused was charged with several offences, including leaving the scene of an accident under s.252(1)(a) of the *Criminal Code*.

At trial in Alberta Provincial Court the judge held that s.252(1)(a) was vague and had no application to a single vehicle motor vehicle accident where someone inside the vehicle was injured. The accused was found not guilty. The Crown then appealed to the Alberta Court of Appeal arguing the judge did not correctly interpret s.252.

Justice Hunt, writing the opinion for the 2:1 majority, agreed with the Crown and ruled that s.252 does apply to single vehicle accidents where a passenger is injured.

Section 252(1) imposes three statutory duties (stop, give name and address, and offer assistance) on a driver and are to be read disjunctively:

> Every person commits an offence who has the care, charge or control of a vehicle ... that is involved in an accident with (a) another person ... and with intent to escape civil or criminal liability fails to stop the vehicle ... give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.

Section 252(2) creates a presumption that a breach of any of the three duties found in (1) demonstrates the requisite intent to escape civil or criminal liability:

> In proceedings under subsection (1), evidence that an accused failed to stop his vehicle, ... offer assistance where any person has been injured or appears to require assistance and give his name and address is, in the absence of evidence to the contrary, proof of an intent to escape civil or criminal liability.

In holding that s.252(1)(a) includes injury to another person who is a passenger in a single vehicle accident Justice Hunt stated:

> In my view, Parliament intended to include single vehicle accidents when a passenger is injured and needs medical assistance. Use of the term "another person" includes passengers in the same vehicle as the accused driver. [para. 18]

The majority concluded the trial judge erred and ordered a new trial.

A Dissenting View

Justice Conrad disagreed with her two colleagues. In her view the legislation describes a situation where a vehicle is involved in an accident with another object (person, vehicle, vessel, aircraft, or cattle). She stated:

"Parliament intended to include single vehicle accidents when a passenger is injured and needs medical assistance. Use of the term "another person" includes passengers in the same vehicle as the accused driver."

> Thus, in the case of a vehicle involved in an accident with "another person" the objects involved in the accident are the vehicle, under a driver's care, charge or control, and a person outside the vehicle. The other person could be a pedestrian or a person sitting on a park bench. It could even include an accident where a vehicle strikes another vehicle which in turn strikes a pedestrian. But the accident will still involve the alleged offender's vehicle being involved in an accident (by striking or otherwise) with an object, including another person, outside of the vehicle. Put in a grammatical context, Parliament intended that the preposition "with" would tie the driver's vehicle to the other object, be it a person, vehicle or cattle involved in the actual accident. [para. 53]

And in summary:

> [T]he modern rule of interpretation leads to the conclusion that section 252(1), as presently worded, does not create an offence unless a vehicle is involved in an accident with an object outside the vehicle, be it another person, a vehicle, vessel, aircraft or cattle in the charge of another person. It follows that subsection 252(1)(a) applies only to a vehicle that is involved in an accident with another person outside the vehicle. The language and the context of the subsection, along with the purpose of the section as a whole, lead to that conclusion. Parliament did not intend that 252(1)(a) would apply to every incident on a roadway involving a passenger, and it did not intend to impose upon cautious drivers the onus of stopping and providing a name and address to a passenger every time the passenger may have been bumped due to the actions of the driver. The legislation is aimed at a driver who is involved in an accident with an outside object and is trying to escape liability. [para. 73]

Justice Hunt would have dismissed the Crown's appeal.

Complete case available at www.albertacourts.ab.ca

WITHOUT EXCISED INFO, NO NEXUS BETWEEN OFFENCE, EVIDENCE & PLACE

R. v. Graham, 2008 PESCAD 07

In 1999 Texas police executed a search warrant on a business premise, which operated a website providing a credit card verification service that acted as an "electronic gateway" to websites that offered child pornographic images that were downloaded by subscribers for a pay-for-fee service. Police seized the business' customer database containing more than 200,000 subscribers. The database was analyzed and the subscribers and credit card information was communicated to various police agencies for investigation, including Canada. In 2004 P.E.I. police started an investigation which focused on six P.E.I. individuals who were suspected of possessing and distributing child pornographic images through the internet. One of the names provided was that of an Elmer Graham, R.R.#4 Montague, P.E.I. C0A 1R0, Canada, using a CIBC Visa card.

P.E.I. police obtained a search warrant authorizing them to obtain the accused's CIBC banking and credit card information. About eight months later police then obtained a search warrant to search the residence, buildings, and motor vehicles belonging to the accused and his father. In addition to the bank information police had the following evidence:

- The use of a particular CIBC credit card in 1999 by someone identified as Elmer Graham of Montague R.R.#4, to access websites offering child pornography.
- The identification of the accused with the name "Elmer Alfred Graham," living at 100 Poverty Beach Road, Murray Harbour North, in December 2004.

As a result of the search the accused was charged with possession of child pornography—computer graphic images depicting sexual organs for a sexual purpose—contrary to section 163.1(4)(a) of the *Criminal Code*.

In 2006 the bank search warrant was struck down in Prince Edward Island Provincial Court. The judge also ruled that the information obtained as a result of the execution of the bank search warrant was to be excised or removed from the information to obtain the residence search warrant issued eight months later. He found there was a possibility that the accused of Poverty Beach Road was the same Elmer Graham of Montague R.R.#4, that paid for access to child pornography in 1999, but without the evidence from the bank search to link the two, there was not reasonable grounds to believe police would find evidence at the residence. The trial judge determined the JP did not have sufficient information before him

to find reasonable grounds and ordered the residence search warrant quashed, the evidence excluded, and the accused was acquitted.

"There must be adequate facts presented to the Justice of the Peace to enable him to decide whether reasonable and probable grounds exist. Mere suspicion is not enough."

The Crown then appealed to the Prince Edward Island Court of Appeal arguing the trial judge erred in determining there was insufficient grounds to issue the second search warrant under s.487(1) of the *Criminal Code*.

Justice Murphy, delivering the opinion of the Court, first analyzed the law. He noted that s.487 allows a justice to issue a search warrant if they are satisfied there are reasonable grounds to believe that there is evidence of an offence in the place to be search. He described a search warrant as "an extraordinary remedy [which] authorizes the invasion of a person's home or business" if the requirements of law are observed. Section 8 of the *Charter*, on the other hand, protects everyone against unreasonable search or seizure. "The courts have tried to balance the constitutional protection afforded to individuals against society's interest in enforcing deplorable crimes," he said. "The law balances these two competing values through rules specifying the circumstances in which a search will be reasonable." And if evidence obtained through a constitutional violation could bring the administration of justice into disrepute if admitted, the *Charter* directs courts to exclude it.

As for whether the search warrant in this case, absent the excised information resulting from the bank search warrant, was properly issued on reasonable grounds, Justice Murphy stated:

> There must be adequate facts presented to the Justice of the Peace to enable him to decide whether reasonable and probable grounds exist. Mere suspicion is not enough.
>
> When the banking information was removed from the residence ITO, it became deficient as it did not contain adequate or sufficient information to establish reasonable grounds.
>
> The trial judge further found that the indices checks that were set out in the residence ITO by the police informant ... and which were used to confirm an address by the Police, were deficient as well. The trial judge determined you could not conclusively link the person who accessed the [U.S.] website to the address searched.
>
> In summary, the residence ITO established that a lengthy investigation ensued which involved a number of police agencies in two countries. It involved acts which were alleged to have occurred as far back as 1999, nearly six years prior to the laying of the charge in this matter. The information was gathered by American law enforcement officials. It contained some statements which were not sworn. It also contained a number of hearsay statements which are permissible if the original source of the evidence can be determined to weigh its trustworthiness.
>
> I would agree with the trial judge when he found that the ITO became fatally flawed when the banking information was removed. The necessary nexus could not be made between the grounds for believing an offence had been committed and that evidence of the commission of the offence would be found on the premises to be searched. [reference omitted, paras. 27-31]

Thus, the trial judge did not err in concluding there was not adequate or sufficient information to issue the residence search warrant. Since the search of the accused's residence was warrantless, his s.8 *Charter* rights were breached. Since there was not sufficient evidence to sustain a conviction after the evidence was excluded under s.24(2), the Crown's appeal was dismissed and the accused's acquittal was upheld.

Complete case available at www.canlii.org

LEGALLY SPEAKING:

Search Warrant Grounds

"It is not required in law for subsequent investigative steps taken by the police as set out in the ITO to themselves be shown to have had grounds pre-existing them. Police investigations have to start somewhere, and may well commence with mere hunches. It is when the warrant is sought that the investigation must provide reasonable and probable grounds set out in the ITO. A constellation of little bits, each inadequate in itself, may well furnish such grounds." - Alberta Court of Appeal Justice *R. v. Watson*, 2008 ABCA 179, at para. 10.

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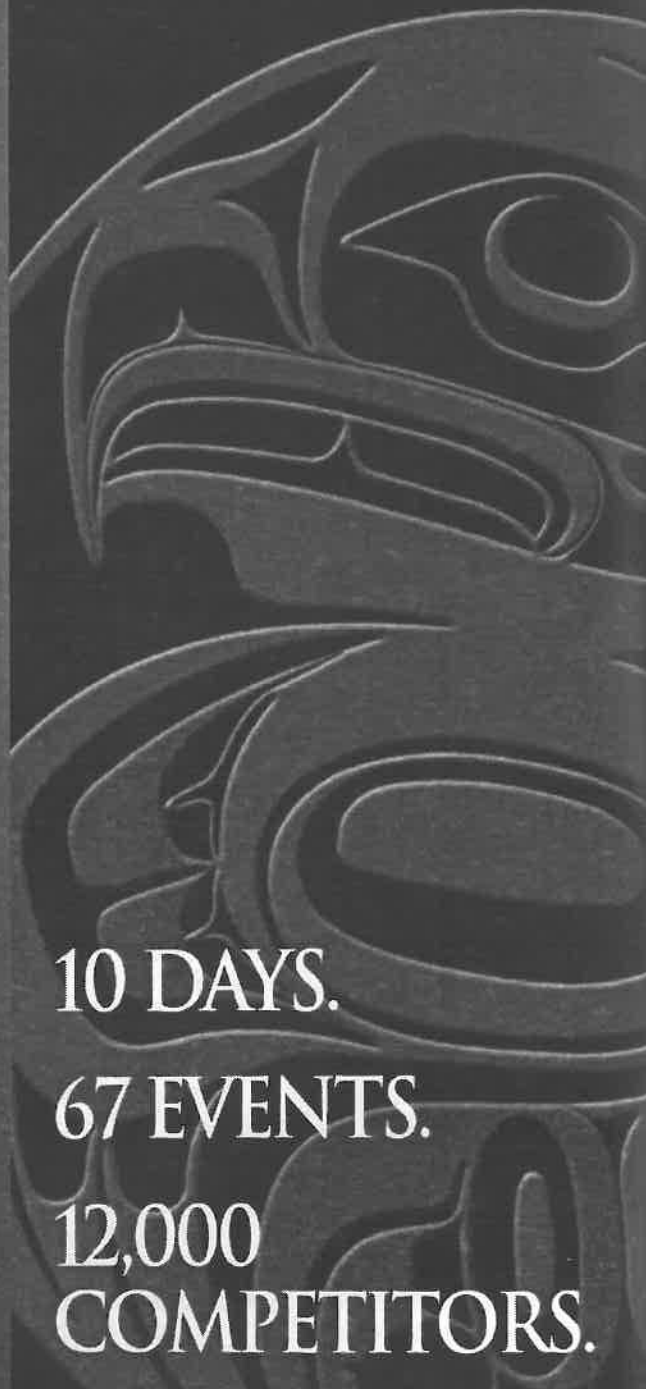

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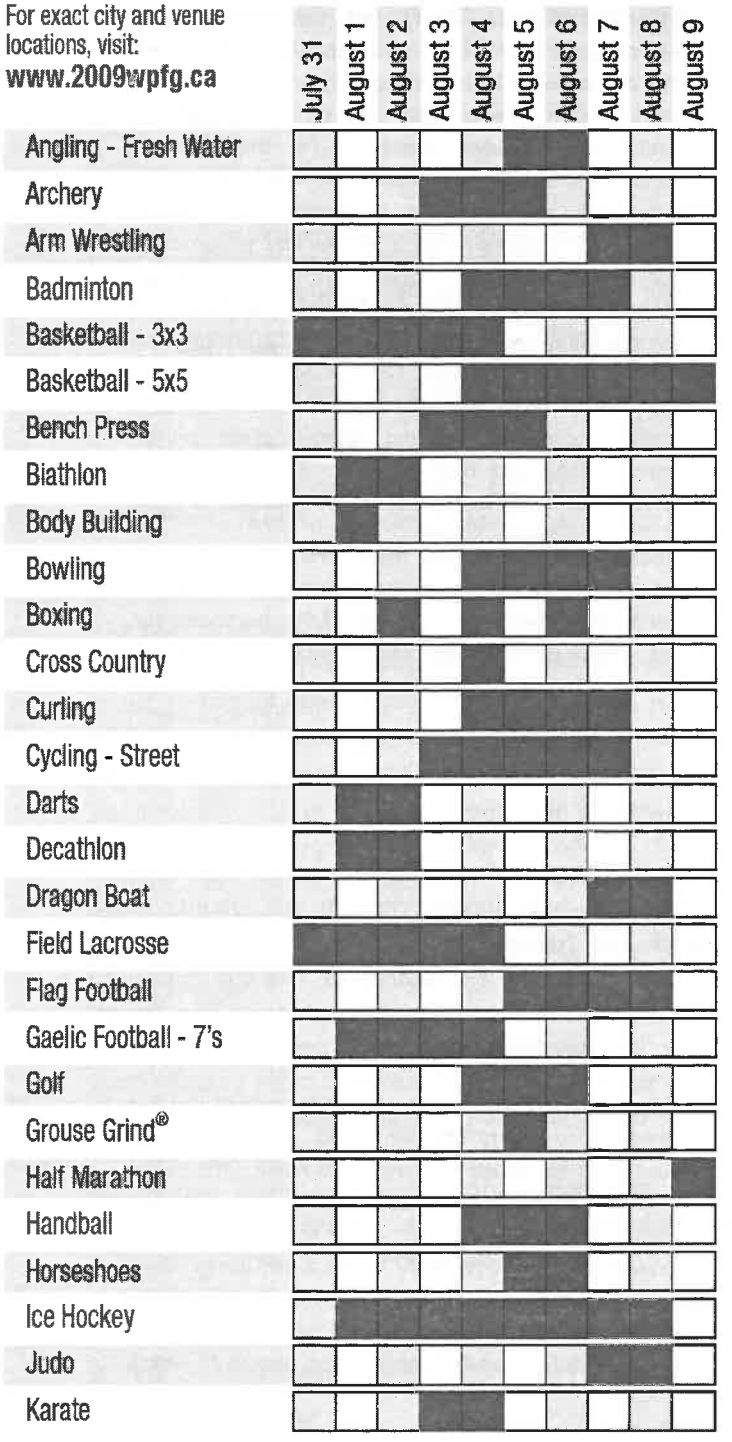

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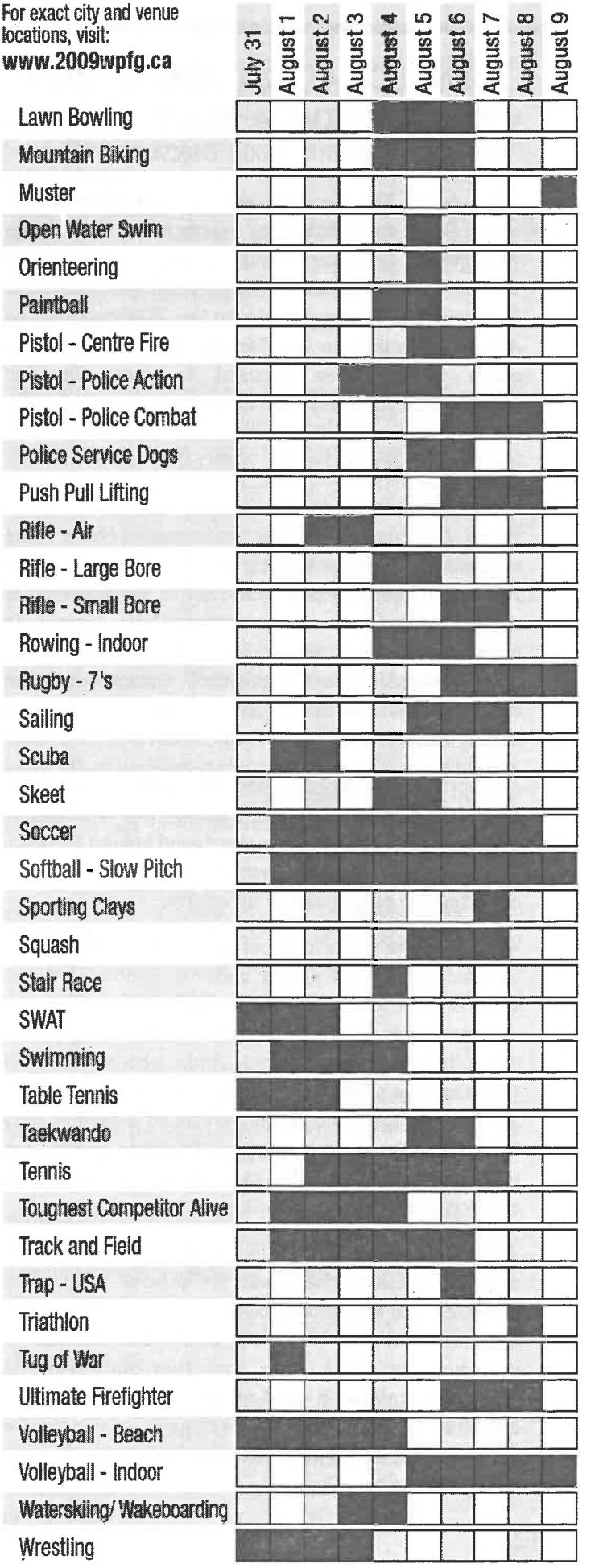


IDENTIFICATION SEARCH WAS PROGRESSIVE & REASONABLE

R. v. Smith, 2008 ONCA 502

The accused and his car were under surveillance by members of the Urban Organized Unit, a crime interdiction team focused on gang and gun violence in Toronto. He was associated with the "Flagstaff Young Assassins", a gang in the Toronto area. Initially, the police followed the accused to stop him for "information purposes" (general intelligence). During the course of surveillance, the accused committed at least one *Highway Traffic Act* (*HTA*) infraction and was stopped.

When confronted by two uniformed officers, he refused to identify himself as required by s.33(3) *HTA*. This section provides that a person who is unable or refuses to surrender their licence in accordance with a demand by a police officer must give reasonable identification of themselves when requested by a police officer. A person who fails to comply may be arrested without a warrant.

The accused was arrested and his car was searched to find identification. No identification was located but a loaded .45 calibre firearm was found behind the rear passenger seat of the vehicle. He was then re-arrested for possession of a firearm.

At trial in the Ontario Superior Court of Justice the accused argued his rights under ss.8 and 9 of the *Charter*, among others, were breached and that the evidence should be excluded under s.24(2). He suggested the police already knew who he was and that the true purpose of the search was simply to see what they might find in the vehicle of a person they believed to be a gang member. In other words, the police were using the *HTA* as a pretext to investigate the accused's gang association.

Although the police initially followed the vehicle to stop and speak to the driver for general intelligence purposes, the trial judge found they had observed him committing traffic violations and were entitled to stop him for those. "The fact that they had the secondary purpose in mind of finding out who he was and what he was doing for intelligence purposes did not convert a lawful stop into an unlawful or arbitrary one," said the trial judge.

As well, although the trial judge acknowledged that the officers were curious about what they might find in a vehicle they knew to be associated with gang members, he was not convinced that police knew who the accused was and that the purpose of their search was to locate identification. He stated:

> I acknowledge, however, that while a search incident of lawful arrest can include the search of a motor vehicle driven by the accused for evidence of the offence, including evidence of identification when an accused is arrested for failure to identify himself under the Highway Traffic Act, the extent of the search must be reasonable in the circumstances. The search of the vehicle must be conducted in a reasonable manner. It undoubtedly would not have been reasonable for the police to start their search by opening the trunk. But here, they conducted themselves in an entirely reasonable manner. The search was a logical and progressive one, invading places of increased privacy only as was necessary. They began by searching the person of the accused, and then proceeded to searching the glove box, console, door flaps, floor and the like. They only lifted a rear seat when the search in more likely places for locating identification proved fruitless, and even then only after noticing that one of the rear seats was not properly engaged.
>
> Finally, even accepting that the police had a secondary reason for wanting to search the car, the law is clear that so long as one of the purposes for the search was a proper search incident to arrest, the search was lawful and reasonable.

The accused was convicted of driving while disqualified and firearms offences and was sentenced to five years in prison.

He then appealed to the Ontario Court of Appeal arguing the trial judge erred in not finding a s.8 breach and failing to exclude the evidence. In his view, the scope of the search of the car exceeded what was reasonable in the circumstances. The Appeal Court, however, disagreed. It stated:

> When a pat down search of the [accused] did not reveal any identification, and the [accused] continued to refuse to provide his name, [the police officer] asked the [accused] if he had any identification in his vehicle. The [accused] replied, "You can't search the car." [Police officers] began to search the vehicle. They began by searching the glove box, front console, the door flaps, and the floor. The [accused's] baseball cap was on the back

seat of the vehicle. The trial judge found that the police only lifted a rear seat when the search in "more likely places for locating identification proved fruitless, and even then only after noticing that one of the rear seats was not properly engaged".

The [accused] submits that the trial judge failed to appreciate that the searching officers had exhausted all locations where identification could reasonably expect to be found and the search was therefore unreasonable. We would disagree. It was open to the trial judge to find that the search was a progressive, reasonable search and one where identity may be found. We would reject the [accused's] submission that the trial judge erred in holding that his rights under s. 8 of the Charter were violated. [paras. 18-19]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

SAFETY SWEEP FOLLOWING MHA APPREHENSION LAWFUL

R. v. Tereck, 2008 MBCA 90

At about 11:00 p.m. a police officer received a phone call from a mental health worker advising that the accused had recently written a letter to his psychiatrist in which he threatened to shoot himself. The officer called the accused's father and confirmed the accused seemed agitated when the father last spoke to him at about 6:00 p.m. that evening. A team of officers met to plan what they would do and discussed amongst themselves that the accused could be involved in the drug trade. After receiving no answer at the door police kicked it open. He was located just inside the doorway, apprehended easily under s.12(1) of Manitoba's *Mental Health Act* (*MHA*), handcuffed, searched and placed in the rear of the police cruiser.

Two officers then conducted a "sweep search"—going from room to room doing a superficial check for other persons or weapons. During the search no other persons or firearms were located but police discovered obvious evidence of a marijuana grow operation. They then left the residence and obtained a search warrant, returning later and finding 300 marijuana plants and equipment to convert plants to a concentrated form of cannabis oil. He was charged with producing marihuana and cannabis oil.

At trial in the Manitoba Court of Queen's Bench the accused argued that the police were not entitled to perform any form of warrantless search after he had been taken into custody. The sweep search was unlawful and therefore violated his s. 8 *Charter* rights. The Crown, on the other hand, contended the police officers had not only a right but a duty to conduct a search to ensure their safety and that of the public, flowing from s.12 of the *MHA* and from the common law right of search that is incident to any lawful power of arrest.

The trial judge found the circumstances in this case were sufficiently exceptional to justify overriding the general prohibition against a warrantless search of the accused's residence. The police had a specific threat that the accused was threatening to shoot himself and had reasons to both apprehend him under the *MHA* and take any reasonable measures to discharge their duty, including the common law right to search. Police knew there was a reasonable possibility a loaded firearm was in the house. They had just kicked open the door and it would have been irresponsible for them to leave a loaded firearm in unsecured premises. They also did not know if there were other persons in the residence, which could pose a threat. There was also the possibility of an injured person or an unsupervised child in the residence. "Indeed, if the police had failed to conduct such a search and any of the identifiable concerns had resulted in a tragedy, the police would have been exposed to criticism," said the trial judge. He found the warrantless search did not breach the accused's s.8 rights and, even if it did, the evidence was admissible under s.24(2).

The accused then appealed to the Manitoba Court of Appeal. Although he agreed the police had the right to enter the house to take him into custody under the *MHA*, he argued *MHA* powers did not extend to cover the search of his residence and the powers of search incidental to arrest did not extend to detentions under the *MHA*. He further submitted that the police had no reasonable grounds to conduct the search nor was it required to ensure the security of the police officers or the public at large, nor was it conducted in good faith.

Justice Monnin, delivering the unanimous opinion of the Manitoba Court of Appeal disagreed with the accused that his s.8 *Charter* rights were breached. He stated:

> I am satisfied that on the factual matrix of the present case, the judge was correct in his finding that extraordinary circumstances existed which justified the sweep search conducted by police after having detained the accused. In addition, the judge's factual finding, contrary to the accused's assertion, was that the police were acting in good faith and merits deference from this court. It would have been a dereliction of their duty or plain negligence if they had left the premises with the possibility that an unsecured firearm was on those premises. In this case, the balance that is required between the interests of the state and public safety on the one hand, and an individual's reasonable expectation of privacy on the other, must fall on the side of protecting the public. [para. 12]

And even if the accused's rights were breached, Justice Monnin also agreed with the trial judge's s.24(2) analysis in not excluding the evidence. The accused's appeal was dismissed.

Complete case available at www.canlii.org

BY THE BOOK:

s.12(1) & (2) Manitoba's *Mental Health Act*

s.12(1) A peace officer may take a person into custody and then promptly to a place to be examined involuntarily by a physician if
(a) the peace officer believes on reasonable grounds that the person
(i) has threatened or attempted to cause bodily harm to himself or herself,
(ii) has behaved violently towards another person or caused another person to fear bodily harm from him or her, or
(iii) has shown a lack of competence to care for himself or herself;
(b) the peace officer is of the opinion that the person is apparently suffering from a mental disorder of a nature that will likely result in serious harm to the person or to another person, or in the person's substantial mental or physical deterioration; and
(c) the urgency of the situation does not allow for an order for an examination under section 11.

Reasonable measures

s.12(2) A peace officer may take any reasonable measures when acting under this section or section 9 or 11 or subsection 44(1) or 48(2), including entering any premises to take the person into custody.

OVERLAPPING SENTENCES MERGE INTO ONE

R. v Pauls, 2008 BCCA 322

The accused was sentenced to two years' imprisonment on charges of possession of stolen property and three months imprisonment on several other charges, to be served concurrently. About 22 months later he pled guilty to a number of offences that he committed while on parole and was sentenced to another 22 months imprisonment to be served concurrently with the sentences he was already serving. He was also placed on probation for 12 months. The accused then appealed his sentence to the British Columbia Court of Appeal arguing his probation order was illegal.

Section 139(1) of the *Corrections and Conditional Release Act* merges overlapping sentences into one. It reads:

> Where a person who is subject to a sentence that has not expired receives an additional sentence, the person is, for the purposes of the Criminal Code, the Prisons and Reformatories Act and this Act, deemed to have been sentenced to one sentence commencing at the beginning of the first of those sentences to be served and ending on the expiration of the last of them to be served.

Because of this, the 22-month sentence imposed merged with the earlier two year sentence imposed to create a single sentence of just over three years and eight months in length. Section 731(1)(b) of the *Criminal Code* only allows a probation order be imposed when an offender is sentenced to a term "not exceeding two years". Therefore, it was not open to the sentencing judge to impose a period of probation on the accused's sentence in this case. His probation order was set aside.

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

Note-able Quote

"He reminds me of the man who murdered both his parents, and then when the sentence was about to be pronounced, pleaded for mercy on the grounds that he was an orphan." -Abraham Lincoln

NO NEED FOR POLICE TO PROVE THAT YOUNG PERSON IN FACT UNDERSTOOD RIGHTS

R. v. L.T.H., 2008 SCC 49

The accused, a 15 year old youth, was arrested by RCMP following a car chase. He was advised of his rights and said he did not want to speak to a lawyer. About 12 hours later the accused was taken to a city police station where he was interviewed. Prior to the interview a police officer reviewed a young offender statement form and the accused said he understood his rights. He did not want to speak to a lawyer, parent, or adult and he initialed and signed the form. He was then interviewed and provided an inculpatory statement. This was all videotaped.

At trial in Nova Scotia Youth Justice Court the accused's mother testified he had a learning disorder and that she had advised the police of this. She also said that she had been with her son on other occasions when he had been questioned by police and that he would rely on her to explain the questions. The judge said the Crown had to prove beyond a reasonable doubt that a statement made by a young person to a person in authority met the requirements of s.146 of the *Youth Criminal Justice Act* (*YCJA*). She found the statement was voluntary—not induced by threats, promises, oppression, or trickery. However, she was not satisfied the accused in fact understood the rights and options explained to him before giving his statement and the consequences of waiving them. In her view, it was not proven beyond a reasonable doubt that the requirements of ss.146(2)(b) and 146(4) had been met. Answering "Yes" to "Do you understand?" was not enough to prove compliance. Rather, at the very least, the officer should have asked the young person to explain in their own words what the rights meant and the consequences of waiving them. The judge then ruled the statement inadmissible.

The Crown appealed to the New Brunswick Court of Appeal arguing, in part, that the judge erred in ruling the statement inadmissible because she imposed an obligation on the Crown to prove beyond a reasonable doubt that the young person in fact understood the explanation. Justice Oland, authoring the judgment of the New Brunswick Court of Appeal, noted that young persons receive special protections under s.146 of the *YCJA* when questioned by police or other person's in authority, in addition to the protections provided by the *Charter*. Although the Crown must prove beyond a reasonable doubt that the accused was provided with a clear and appropriate explanation of their rights and options found in s.146(2)(b), the Crown does not need to prove the young person actually understood the explanations given by police—there was also no requirement that the young person re-cite or explain his understanding back to the police. As for waiver under s.146(4), the Crown is required to satisfy a judge that the young person understood their rights and the effect of waiving those rights. The standard of proof placed on Crown in establishing compliance with s.146(4) is not proof beyond a reasonable doubt but rather a probability standard. The Crown's appeal was allowed, the acquittal set aside, and a new trial was ordered. The accused then appealed to the Supreme Court of Canada.

Approach: Subjective or Objective?

In a split decision (4:3) the majority of the Supreme Court concluded the test for compliance with the informational component under s.146(2)(b) of the *YCJA* is not a "subjective test"—an approach taken by the trial judge—but rather an "objective" one. Justice Fish, writing the majority opinion, ruled the test "does not require the Crown prove that a young person in fact understood the rights and options explained". However, an individualized approach is required which "takes into account the age and understanding of the particular youth being questioned." He continued:

> A purposive interpretation of s.146(2)(b) makes clear that it requires persons in authority to make reasonable efforts to ensure that the young detainee to be questioned is capable of

> "[T]he test for compliance with the informational component [of s.146(2)(b)] is objective. It does not require the Crown to prove that a young person in fact understood the rights and options explained to that young person pursuant to s. 146(2)(b). That said, compliance presupposes an individualized approach that takes into account the age and understanding of the particular youth being questioned."

> understanding the explanation of the rights being given. This follows from the clear wording of the section: The explanation must be provided in language appropriate to the particular young person's age and understanding. Without some knowledge of the young person's level of understanding, the officer will be unable to demonstrate that the explanation was tailored to the capabilities of the young person concerned. [para. 22]

As for the approach to be taken by police officers with regard to s.146(2)(b), Justice Fish stated:

> I take care not to be understood to require police officers ... to ask young persons in every case to "recite back" or "explain back" their rights. In some instances, this may well demonstrate that the explanation was both appropriate and sufficient. And it may tend to show that the rights waived were in fact understood — which is of course essential to the validity of the waiver. But "reciting back" or "explaining back" is not transformed by its evident utility into a legal requirement under s. 146. The reading of a standardized form will not normally suffice in itself to establish the sufficiency of the caution required by s.146(2)(b). Persons in authority must, in addition, acquire some insight into the level of comprehension of the young person concerned, since the mandatory explanation must be appropriate to the age and understanding of that young person....
>
> Properly crafted and scrupulously applied, standardized forms nonetheless provide a useful framework for the appropriate interrogation of young detainees. ... In short, adherence to standardized forms can facilitate, but will not always constitute, compliance with s.146(2)(b). Compliance is a matter of substance, not form. The trial court must be satisfied, upon considering all of the evidence, that the young person's rights were in fact explained clearly and comprehensibly by the person in authority. ...
>
> The requirement of understanding and appreciation applies to all young persons, including those who are no strangers to the criminal justice system. Section 146(2)(b) incorporates principles of fairness that must "be applied uniformly to all without regard to the characteristics of the particular young person" ...
>
> This does not mean that experience in the criminal justice system is irrelevant to the inquiry as to the young person's understanding. An individualized, objective approach must take into account the level of sophistication of the young detainee and other personal characteristics relevant to the young person's understanding. Police officers, in determining the appropriate language to use in explaining a young person's rights, must therefore make a reasonable effort to become aware of significant factors of this sort, such as learning disabilities and previous experience with the criminal justice system. [references omitted, paras. 26-30]

Standard of Proof

Contrary to the holding of the Nova Scotia Court of Appeal, which found the standard of proof moved from proof beyond a reasonable doubt for the explanation to a balance of probabilities for the waiver, the Supreme Court of Canada ruled that the standard of proof beyond a reasonable doubt should be applied throughout. This standard, the top court found, was consistent with the *YJCA* provisions, statement admissibility at common law, and the high standards required in proving a valid waiver. Justice Fish held:

> In my view, the Crown's evidentiary burden will be discharged by clear and convincing evidence that the person to whom the statement was made took reasonable steps to ensure that the young person who made it understood his or her rights under s. 146 of the YCJA. A mere probability of compliance is incompatible with the object and scheme of s. 146, read as a whole. Compliance must be established beyond a reasonable doubt. [para. 6]

But this high standard will not make it impossible for the Crown to discharge its burden. As the majority noted, "where compliance with the informational component is established beyond a reasonable doubt, the trial judge will be entitled — and, indeed, expected — to infer, in the absence of evidence to the contrary, that the young person in fact understood his or her rights under s. 146."

In this case the trial judge was not satisfied that the Crown discharged its burden under s. 146. She had a reasonable doubt that the accused's rights were explained to him in language appropriate to his understanding or that he understood his right to counsel and therefore could validly waive it. She found the accused's statement inadmissible and entered an acquittal. Her findings on the issue of compliance with s. 146 was supported by the evidence and was entitled

to deference. The accused's appeal was allowed, the order for a new trial was set aside and his acquittal was restored.

A Different View

A minority of Canada's highest court agreed that Crown must prove beyond a reasonable doubt that a statement made by a young person be voluntary, but that the standard of proof required in proving compliance with the "informational" and "waiver" requirements under s.146 of the *YCJA* is one of proof on a balance of probabilities. Justice Rothstein, authoring the three judge minority opinion, noted that other than the confessions rule, the standard of proof for preliminary questions pertaining to the admissibility of evidence is one of a balance of probabilities. Applying a beyond a reasonable doubt standard to the informational and waiver requirements under s.146 would be inconsistent with these other preconditions to admissibility.

However, even if the trial judge applied a balance of probabilities test to compliance by police with s.146, she still would have found the standard was not met. Thus, the minority would also have allowed the appeal, set aside the order for a new trial, and restored the acquittal.

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

BY THE BOOK:

s.146(2)(b) & (4) Youth *Criminal Justice Act*

s.146(2) No oral or written statement made by a young person who is less than eighteen years old, to a peace officer or to any other person who is, in law, a person in authority, on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless ... (b) the person to whom the statement was made has, before the statement was made, clearly explained to the young person, in language appropriate to his or her age and understanding, that

(i) the young person is under no obligation to make a statement,

(ii) any statement made by the young person may be used as evidence in proceedings against him or her,

(iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (c), and

*** *** ***

s.146(4) A young person may waive the rights ... but any such waiver

(a) must be recorded on video tape or audio tape; or

(b) must be in writing and contain a statement signed by the young person that he or she has been informed of the right being waived.

STATEMENT ONUS & BURDEN GRID

Issue	Onus	Burden	Details
Voluntariness (Common law) "confessions rule"	Crown	Beyond a reasonable doubt	Crown must prove statement made to police was voluntary beyond a reasonable doubt. If Crown cannot prove statement was voluntary, the statement is inadmissible at common law. (see for example R. v. Oickle, 2000 SCC 88, R. v. Singh, 2007 SCC 48)
Right to Silence (*Charter* s.7)	Accused	Balance of probabilities	Accused must prove on a balance of probabilities that their s.7 *Charter* right was violated. If accused proves *Charter* right violated, court will engage in a s.24 *Charter* enquiry. (see for example R. v. Hebert, (1990) 2 S.C.R. 151)
Right to Counsel (*Charter* s.10(b))	Accused	Balance of probabilities	Accused must prove on a balance of probabilities that their s.10(b) *Charter* right was violated. If accused proves *Charter* right violated, court will engage in a s.24 *Charter* enquiry. (see for example R. v. Manninen, (1987) 1 S.C.R. 1233)
Youth Statement Explanation (*YCJA* s.146(2)(b)) "Informational component"	Crown	Beyond a reasonable doubt	Crown must prove beyond a reasonable doubt that the explanation given to an accused youth was clear and in language appropriate to the youth's age and understanding. The Crown need not prove the young person actually (in fact) understood the explanation. (see R. v. L.T.H., 2008 SCC 49)
Youth Statement Waiver (*YCJA* s.146(4))	Crown	Beyond a reasonable doubt	Crown must prove beyond a reasonable doubt that the young person understood what right they were waiving and the effect of the waiver will have on that right. (see R. v. L.T.H., 2008 SCC 49)

EXCLUSION OF CONSCRIPTED BREATH SAMPLES NOT AUTOMATIC

R. v. Banman, 2008 MBCA

Two police officers on speed enforcement patrol saw a pickup truck speeding at 2:24 am. The truck was stopped and an officer formed the opinion that the accused was impaired. He was arrested, read his *Charter* rights, standard police caution, and the breathalyzer demand. He was then transported to the police station, administered a breathalyzer test, and provided two breath samples in excess of 80mg%. He was charged with impaired driving and driving over 80mg%.

At trial in Manitoba Provincial Court the judge concluded that the officer making the breathalyzer demand did not have the reasonable and probable grounds as required under s.254(3) of the *Criminal Code*. She ruled the certificate of analysis from the breathalyzer test tendered by Crown inadmissible without a s.24(2) *Charter* analysis. The *viva voce* evidence of the breathalyzer technician was also thrown out. The officer's lack of reasonable and probable grounds required for the breathalyzer demand was a s.8 *Charter* violation (an unreasonable seizure) and it was excluded after briefly considering s.24(2). An appeal to the Manitoba Court of Queen's Bench was unsuccessful. The appeal judge found that it was unnecessary for the trial judge to undertake a s.24(2) analysis in deciding to exclude the results of the analysis of the accused's breath where there was a lack of reasonable and probable grounds for the demand. The Crown appealed this point of law to the Manitoba Court of Appeal.

Justice MacInnes, writing the decision of Manitoba's top court, found the appeal judge erred in finding the absence of reasonable and probable grounds with respect to a breathalyzer demand will *ipso facto* result in the exclusion of the evidence resulting from the breathalyzer test—whether it be the certificate of analysis or the *viva voce* evidence of the test results—without the need for a s.24(2) inquiry. Rather, he ruled the a s.24(2) analysis was required regardless of whether it was the certificate of analysis or the *viva voce* evidence of the test results.

The lawfulness of a search and seizure arising from the taking of a breath sample—not the admissibility of evidence derived therefrom—will depend on the existence of reasonable and probable grounds. In other words, both the *Criminal Code* and the *Charter* require reasonable and probable grounds—s.254(3) as a statutory necessity and s.8 as a precondition to a reasonable search or seizure. However, in the case of a *Charter* breach a s.24(2) analysis must follow.

Even though a breath sample obtained as a result of a *Charter* breach is conscriptive evidence—which will generally (but not always) render a trial unfair—there is no requirement that such evidence be automatically excluded without a s.24(2) analysis. In concluding the appeal judge erred in law in finding it unnecessary to perform a s.24(2) analysis to determine the admissibility of the certificate of analysis Justice MacInnes wrote:

> In my view, it is notable that in other situations where pre-conditions as to police action are required before such action can encroach upon the rights of an individual, the jurisprudence makes clear that in the event of a breach of the pre-condition and thus a Charter violation, a s. 24(2) analysis is required before exclusion of evidence is ordered. This is seen in respect of the obtaining of a search warrant under s. 487(1) of the Code ..., the obtaining of a telewarrant ... and the obtaining of a search warrant under s. 11(1) of the Controlled Drugs and Substances Act ... [para. 50]

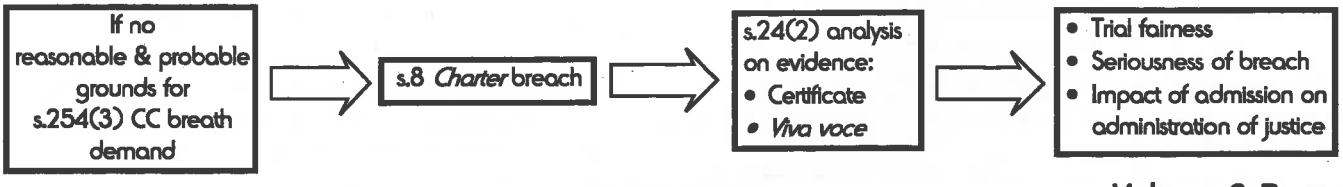
The Crown's appeal was allowed and a new trial was ordered.

Complete case available at www.canlii.org

Latin Legal Lingo

"Viva voce" - with the living voice; orally; oral testimony; by word of mouth.

Chain of Reasoning



PROBATION BANISHMENT CLAUSE THE EXCEPTION, NOT THE RULE

R. v. Kehijekonaham, 2008 SKCA 105

The accused had a dispute with his brother, became agitated and began punching the bedroom door of a house belonging to the Onion Lake First Nation, but in the lawful possession of his brother. He put several holes in the door which led to a charge of mischief, contrary to s.430(4) of the *Criminal Code*. Five days later, while out on a police imposed undertaking not to communicate directly or indirectly with his brother, the accused began damaging his brother's truck, breaking the windshield and the driver's side window. He was charged with mischief and failure to comply with the conditions of an undertaking. About 11 days later he entered into a recognizance with terms that, among other things, he keep the peace and be of good behaviour and abstain from the possession and consumption of alcohol. Later that day he was found to be intoxicated and not allowing his sister to leave a house on the Onion Lake First Nation. This led to two charges for failing to comply with the terms of his recognizance. He was was also charged with being intoxicated on a dry reserve.

In Saskatchewan Provincial Court the accused was sentenced to five months in jail for the mischief and breach of recognizance charges, 30 days concurrent for being intoxicated on a dry reserve, and time served (six days). He was also placed on probation for one year on the charge of having contact with his brother, contrary to his undertaking. One of the conditions of his probation was not to be at the Onion Lake First Nations except for attending court. The accused, however, appealed the validity of the banishment clause on his probation order to the Saskatchewan Court of Appeal.

Justice Richards, authoring the Court's opinion, found the the banishment clause lacked an evidentiary basis. Although a banishment clause can be included in a probation order under s.732.1(3)(h) of the *Criminal Code*, which allows a court prescribe "other reasonable conditions as the court considers desirable ... for protecting society and for facilitating the offender's successful reintegration into the community," such banishment should be "considered the exception rather than the rule." And hence, given its exceptional nature, the imposition of the banishment clause required a proper evidentiary foundation be established.

In this case, the Court found the impact of the banishment order would be significant. The accused was 22 years old and Onion Lake First Nation was his home. "Banishment would leave him wholly disconnected from his community and with no obvious place to live," said Justice Richards. Further, this was not a case involving personal violence against his brother. The dispute arose over their father's estate and there was no suggestion the accused's brother was living in fear or anxiety or that banishment was necessary to ensure his brother's personal safety. "The mere failure to comply with [a no contact] order is not, in and of itself, enough to warrant the extreme step of imposing a banishment order."

Since there was no evidentiary basis for the Provincial Court judge to include a banishment clause in the probation order, the accused's appeal was allowed and the clause was struck from the probation order.

Complete case available at www.canlii.org

BY THE BOOK:

s.732.1(3)(h) *Criminal Code*

The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:

...

(h) comply with such other reasonable conditions as the court considers desirable ... for protecting society and for facilitating the offender's successful reintegration into the community.

'STRADDLE EVIDENCE' BASED ON GENERAL DATA DOES NOT REBUT PRESUMPTION

R. v. Eddingfield, 2008 SKCA 84

The accused was stopped driving by police and provided two breath samples, each indicating a blood alcohol concentration (BAC) of 130mg%. At trial in Saskatchewan Provincial Court the accused testified he had consumed six bottles of beer over a 3 ½ hour period before he was stopped and weighed 200 pounds or more. An expert witness he called said a 200 pound man consuming six 341-millilitre bottles of beer (5% alcohol by volume) over the time period the accused testified to could have a BAC when he was stopped between 45 and 90mg%, depending on the individual's rate of elimination. The expert, however, did not test the accused to determine his actual rates.

The Provincial Court judge convicted the accused on the over 80mg% charge because she was not satisfied he had met the test for evidence to the contrary necessary to rebut the presumption of identity found in s.258(1) of the *Criminal Code*. Since the expert defence evidence placed the accused's BAC in a range where he could have been at 90mg% when stopped by police, the evidence did not tend to show his BAC was below 80mg% at the time of driving.

The accused appealed to the Saskatchewan Court of Queen's Bench arguing the defence evidence constituted a reasonable doubt on the question of evidence to the contrary. The appeal judge agreed, holding that the defence evidence only needs to straddle the prohibited amount, or provide a range in which some of the BAC is below 80mg%, in order to rebut the presumption. The evidence tendered was capable of putting the accused within the prescribed limit (under 80mg%) and the trial judge only referred to and dealt with the portion of the range that put the accused over. The accused's conviction was overturned and a new trial was ordered.

The Crown then appealed to the Saskatchewan Court of Appeal, which unanimously allowed the appeal. Between the time of the Court of Queen's Bench judgment and this appeal, the Supreme Court of Canada had rendered its decision in *R. v. Gibson & MacDonald*, 2008 SCC 16. In that case, the Supreme Court of Canada answered the broad question of whether straddle evidence was capable of rebutting the statutory presumption found in s.258(1)(d.1). Justice Jackson, writing the opinion of the Saskatchewan Court of Appeal, found the decision in *Gibson and MacDonald* was divided:

- Four judges "closed the door completely" and found that in all cases straddle evidence merely constituted an attempt to defeat the statutory presumption itself and therefore did not tend to show an accused's BAC did not exceed the legal limit at the time of the alleged offence. Thus, straddle evidence can never rebut the presumption;
- Three judges narrowed the law considerably but "would not close the door completely", instead finding that straddle evidence based on the alcohol elimination rates in the general population will rarely rebut the statutory presumption. Straddle evidence is admissible and considering the evidence as a whole may constitute evidence to the contrary. However, a wide straddle range could not be considered evidence to the contrary because it does not tend to show the accused was at or under the legal limit. Thus, there is the possibility, although rare, that straddle evidence may rebut the presumption; and
- Two judges adopted the prevailing direction approach, which requires more of the straddle range to be below the legal limit than above it to rebut the presumption.

As far as the result of *Gibson & MacDonald* was concerned (seven judge's agreeing in the result but taking two different approaches), Justice Jackson would allow the Crown's appeal and restore the accused conviction. Since the straddle range in this case was a wide range (45mg% to 90mg%) and the only evidence put forward to show a BAC under 80mg% at the time of driving, it was insufficient to rebut the presumption.

"[S]traddle evidence based on general data merely constitutes an attempt to defeat the statutory presumption established by s.258(1)(d.1) and, taken alone, does not tend to show that the accused's blood alcohol concentration did not exceed the legal limit at the time of the alleged offence."

The Court, however, did not stop there. Instead, the Saskatchewan Court of Appeal decided to rule upon the precedential value of the unevenly divided Supreme Court in *Gibson and MacDonald* and answer the question of whether straddle evidence based on general absorption and elimination rates will, taken alone, constitute evidence to the contrary and rebut the presumption under s.258(1)(d.1). Justice Jackson, noting the "the strong precedential value of a four person majority of the majority of the Court" and "the prevailing trend in the jurisprudence" led him to conclude that "straddle evidence based on general data merely constitutes an attempt to defeat the statutory presumption established by s.258(1)(d.1) and, taken alone, does not tend to show that the accused's blood alcohol concentration did not exceed the legal limit at the time of the alleged offence." He did however, leave the question about whether straddle evidence based on the accused's own absorption and elimination rates, as opposed to general data, could raise a reasonable doubt for another day.

Having allowed the appeal, the Court restored the accused's conviction and sentence.

Complete case available at www.canlii.org

BY THE BOOK:

s.258(1)(d.1) *Criminal Code*

In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or in any proceedings under subsection 255(2) or (3), ... (d.1) where samples of the breath of the accused or a sample of the blood of the accused have been taken as described in paragraph (c) or (d) under the conditions described therein and the results of the analyses show a concentration of alcohol in blood exceeding eighty milligrams of alcohol in one hundred millilitres of blood, evidence of the result of the analyses is, in the absence of evidence tending to show that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed did not exceed eighty milligrams of alcohol in one hundred millilitres of blood, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed exceeded eighty milligrams of alcohol in one hundred millilitres of blood...

CRIMINAL CODE IMPAIRED DRIVING PRESUMPTIONS

Presumption	Section	Description
Presumption of Care or Control	s.258(1)(a)	Person occupying driver's seat deemed to have care or control of the vehicle, unless the accused establishes they did not occupy the seat for the purpose of setting the vehicle in motion.
Presumption of Accuracy	s.258(1)(g)	A certificate of a qualified technician stating the analysis of the samples made by means of an approved instrument in proper working order operated by the technician is evidence of the facts in the certificate.
Presumption of Identity	s..258(1)(c)	Samples of breath taken pursuant to a demand under s.254(3), if taken as soon as practicable and, in the case of the first sample, not later than two hours after the offence, is proof that the concentration of alcohol in the blood at the time of testing was the same when the offence was committed.
Presumption of Identity	s.258(1)(d.1)	Samples of breath taken pursuant to a demand under s.254(3), if taken as soon as practicable and, in the case of the first sample, not later than two hours after the offence, is proof that the concentration of alcohol in the blood, if over 80mg% at the time of testing, was over 80mg% when the offence was committed.

ACTUAL POSSESSION OF DRUGS NOT NECESSARY FOR PPT CHARGE

R. v. Bonassin, 2008 NLCA 40

Pursuant to a search warrant, the police seized a parcel containing a computer at a courier's office. Inside the parcel police found a computer tower containing eight pounds of marijuana and an ounce of cocaine. Police replaced the contents with another computer tower containing books in equivalent weight to that of the drugs. The parcel was returned to the courier for delivery. Police followed the courier vehicle when the parcel was delivered as addressed, to one Carrie Wickett. The courier driver entered the residence with the parcel and then left. Minutes later a taxicab arrived at the residence. The police then approached the house and, as an officer neared the front door, the accused opened it carrying the parcel in one hand and a suitcase in the other. Upon seeing the police, he backed into the house and closed the door, but was arrested just inside. The police found the address slip for the parcel on the kitchen table and seized $2,445.25 in cash from the accused.

At trial in Newfoundland Provincial Court the accused testified he had met the addressee of the parcel, Carrie Wickett, four days earlier and went to her residence to buy $100 worth of marijuana. He said that when he arrived at Wickett's residence she was not home. A person who was at the house said he could wait, so he did. After a while he decided to leave and called a cab. Shortly thereafter there was a knock on the door. He believed it was the cab, but instead it was a courier. He signed for a package, but didn't know what was inside, and as he was struggling to move the parcel out of his way the police rushed in. The trial judge found the accused's story to be incredible and convicted him of possessing cocaine and marihuana for the purpose of trafficking along with breach of probation.

Since the parcel delivered actually contained no drugs, the accused then challenged the trial judge's ruling that he was in possession to the Newfoundland Court of Appeal, .

The definition of possession under the *Controlled Drugs and Substances Act* is set out in s.4(3) of the *Criminal Code*. It may include actual possession or be attributed by operation of law. Section 4(3) provides:

> For the purposes of this Act,
> (a) a person has anything in possession when he has it in his personal possession or knowingly
> (i) has it in the actual possession or custody of another person, or
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
> (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

Generally, possession includes three elements, which must be interpreted and applied to the particular circumstances of the case:

1) knowledge of the item;
2) intention or consent to have possession of the item; and
3) control over the item.

In finding joint possession in this case, Justice Welsh, authoring the 2:1 majority, held the the trial judge was aware the drugs had been removed by the police prior to delivery but found the accused intended to take the parcel which he believed to contain drugs. Because there was an agreement between the accused and Carrie Wickett made before the seizure of the parcel containing drugs then he was guilty of joint possession. Justice Welsh stated:

> In the case on appeal, the evidence was sufficient to establish beyond a reasonable doubt that, before the police removed the drugs, [the accused] had joint possession with Wickett. The three elements of knowledge, consent, and control were established. By permitting delivery of the "fake" parcel, the police identified [the accused] as a participant in the trafficking scheme. The evidence and findings of fact by the trial judge established beyond a reasonable doubt that [the accused] and Wickett had knowledge of the drugs, intended or consented to have possession of them, and had control over the drugs until they were seized by the police. To establish the offence it was not necessary that [the accused] take actual possession of the drugs.
>
> ... Joint possession of the drugs by [the accused] at the relevant time, that is, prior to seizure of the parcel by the police, was proved beyond a

reasonable doubt, and convictions were properly entered. [paras. 27-28]

Since the trial judge did not err in determining that the evidence established beyond a reasonable doubt that the accused was guilty of possession for the purpose of trafficking in marijuana and cocaine, the accused's appeal was dismissed.

A Different View

Justice Rowe, disagreed with the majority on their view of possession. First, since the police removed all of the drugs from the computer the accused did not have personal possession of them. Nor was it proven that he had joint or constructive possession because there was no evidence establishing that the accused exerted control over the drugs. "While it is logical to infer that [the accused] must have made some arrangement with the supplier of the drugs (which supplier would have had possession of the drugs), there is no evidence of this," said Justice Rowe. "In the absence of such evidence, I do not see a basis to say there is proof beyond a reasonable doubt of [the accused's] 'control' and, thus, either joint or constructive possession of the drugs." Thus, the accused's convictions for possession should have been set aside.

However, Justice Rowe would have found the accused guilty of "attempted possession" for the purpose of trafficking. Under s.24(1) of the *Criminal Code*, "every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence." Justice Welsh found that "all the elements of possession for the purpose of trafficking were made out, save for the fact that the drugs did not come into [the accused's] possession because the police had intercepted the computer box containing the drugs and removed all of them." As for the sentence, this was not a case where a lesser sentence for an attempt was warranted. Thus, Justice Welsh would have set aside the convictions for possession for the purpose of trafficking, entered convictions for attempted possession for the purpose of trafficking, and left the sentence as is.

Complete case available at www.canlii.org

LEGALLY SPEAKING:

Possession

"Constructive possession is comprised of three elements ... The first element is knowledge of the item. Second is the mental element which may be described as intention or consent to have possession of the item. The final element is control over the item." - Newfoundland Court of Appeal Justice Welsh, *R. v. Daniels* (2004), 242 Nfld. & P.E.I.R. 290 (NLCA), at para. 9, reference omitted.

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"In order to constitute constructive possession, which is sometimes referred to as attributed possession, there must be knowledge which extends beyond mere quiescent knowledge and discloses some measure of control over the item to be possessed....

In order to constitute joint possession pursuant to section 4(3)(b) of the Code there must be knowledge, consent and a measure of control on the part of the person deemed to be in possession...." - Ontario Court of Appeal Justice Kozak, *R. v. Pham* (2005), 203 C.C.C. (3d) 326 (ONCA) (affirmed [2006] 1 S.C.R. 940), at paras. 15-16, references omitted.

****

"[N]either constructive possession nor joint possession requires proof of manual handling. To establish constructive possession, it was incumbent upon the Crown to prove beyond a reasonable doubt that the [accused] knew of the presence of the cocaine and that he had some measure of control over its location. To establish joint possession, the Crown was required to show that someone other than the [accused] had possession of the cocaine with his knowledge and consent and that he had some measure of control over it." - British Columbia Court of Appeal Justice Smith, *R. v. Fisher*, 2005 BCCA 444, at para. 24.

****

"Described generally, the three components of possession have been stated to be: (1) knowledge of the item, (2) intention or consent to have possession of the item, and (3) control over the item." - Newfoundland Court of Appeal Justice Welsh, *R. v. Bonassin*, 2008 NLCA 40, at para. 26.

****

"In order to prove possession the Crown must establish the following:

(1) manual or physical handling of the prohibited object;
(2) knowledge; and
(3) control.

Thus, the offence of possession is made out where there is the manual handling of an object co-existing with the knowledge of what the object is, and both these elements must co-exist with some act of control." - British Columbia Court of Appeal Justice Oppal, *R. v. York*, 2005 BCCA 74, at para. 10-11.

POLICE DELIVER 'ANTIDOTE' TO SEVER EARLIER *CHARTER* BREACH

R. v. Simon, 2008 ONCA 578

In 1999 a Task Force formed to investigate a series of three sexual assaults involving females received an anonymous tip indicating that the accused was the perpetrator of the attacks. Task Force members decided to physically surveill the accused, hoping to obtain a "throw away" or discarded sample of his DNA for comparison purposes. He was seen to enter a stolen van but drove away, breaking the surveillance. Police later found the accused (without the van) and arrested him for possessing a stolen vehicle. He was advised of his right to counsel under s. 10(b) of the *Charter* and cautioned on the stolen property charge. He was taken to the police station and again given his rights under s.10(b) in respect to the possession of stolen property charge.

Although the officers who made the arrest were not members of the Task Force, they were aware the accused was a suspect in the sexual assault investigations. Task Force members did not have reasonable grounds to arrest the accused on any of the sexual assaults, but were suspicious of him based on the tip and his possession of a stolen van. Stolen vans had been used in all three sexual assaults. Furthermore, he matched the very general description of the perpetrator — a young black male. After arriving at the police station, duty counsel was contacted and the accused consulted with a lawyer. He was taken to an interview room for questioning and told police the location of the stolen van. It was located and impounded for further investigation by the Task Force.

Later, the accused was moved to a different interview room where he was interviewed by Task Force members. They were not interested in the stolen van charge but wanted to obtain his consent for a saliva sample from which the police could obtain his DNA for the purpose of comparing it with the DNA of the perpetrator. When the interview began, the officers did not tell him that he was a suspect in the Task Force's investigation or that they were interested in obtaining a DNA sample, nor did they advise him of his right to counsel under s. 10(b) in connection with the sexual assaults. They confirmed that he had spoken to duty counsel, had not been mistreated, and gave him the usual secondary caution and reviewed his personal, academic and employment history. Later in the interview the officers introduced the Task Force investigation and the accused became aware that the focus of the interrogation changed from stolen vans to sexual assaults. He was not however, advised of his s. 10(b) rights in respect of the sexual assaults. During the interview, the accused denied involvement in the sexual assaults three times.

The officers introduced the possibility of providing a sample of saliva for DNA purposes and that it would be "strictly voluntary". A consent form was read to the accused. It referred to the three sexual assaults, explained how the samples would be scientifically tested and analyzed and compared with other evidence, and that the purpose of the analysis and comparison was to positively identify the person responsible for sexual assaults or to eliminate persons as possible suspects. The form also advised the accused that he was not required to give the samples, could refuse to provide them, and could discuss the request with anyone, including a lawyer. Furthermore, in response to whether he should call a lawyer, the officer said he could speak to a lawyer if he wished but it was up to him. He subsequently signed the consent form and a saliva sample was taken.

At trial in the Ontario Superior Court of Justice the judge found the Task Force members were constitutionally obliged to tell the accused that the focus of their questioning had changed from the stolen van to the sexual assaults, and were required to advise him of his s.10(b) rights in the context of their investigation of the sexual assaults. Thus, any of his statements at the point the focus of the investigation had changed were inadmissible pursuant to s. 24(2) of the *Charter*. However, the trial judge found the accused had given an express, informed and voluntary waiver of his *Charter* rights before agreeing to provide a sample of his saliva to the police for DNA comparison purposes. This effective waiver of his s.8 rights prior to giving the saliva sample rendered the sample admissible. The accused was convicted by a jury of multiple offences arising out of the three sexual assaults and the judge declared him a dangerous offender

The accused appealed his convictions to the Ontario Court of Appeal arguing, in part, that his saliva sample

was obtained as a result of breaches under s.8 and 10(b) of the *Charter*. In his view, the saliva sample and all evidence derivative of that sample, including the expert evidence, should have been excluded from evidence pursuant to s. 24(2). Without the DNA, the Crown's evidence could not establish beyond a reasonable doubt that he was the perpetrator of the offences. The Crown, on the other hand, conceded the police breached the accused's s.10(b) *Charter* rights by not re-advising him of the right to counsel, but that he gave an express and informed waiver that effectively severed any connection between that s.10(b) violation and his giving of the sample. Thus, the accused's consent to the taking of the saliva sample, being express, voluntary, and informed, did not breach s.8 and was not obtained in a manner that breached s.10(b).

Waiver

A person can waive their rights under the *Charter*. Justice Doherty, writing the opinion of the Court, put it this way:

> Section 8 of the Charter protects individuals against unwarranted state intrusions upon their privacy interests. One of the values animating the right protected by s. 8 is personal autonomy. Personal autonomy, however, also dictates that an individual must be able to waive his or her right to be left alone by the state and to consent to what, absent that consent, would be an unreasonable state invasion of personal privacy. If an individual provides that consent, what would otherwise be a search or seizure, is no longer a search or seizure. The reasonableness standard mandated by s. 8 has no application where the individual has consented to the state intrusion upon his or her privacy.
>
> The quality of a purported s. 8 waiver must be commensurate with the importance of the right being relinquished. Courts will be slow to infer a waiver, particularly where the individual who is said to have waived his or her s. 8 rights is detained and is the target of a criminal investigation. The Crown bears the burden of demonstrating that any waiver relied on by the Crown is in all of the circumstances an effective and informed waiver of an individual's s. 8 rights. [references omitted, paras. 48-49]

"If an individual provides that consent, what would otherwise be a search or seizure, is no longer a search or seizure. The reasonableness standard mandated by s. 8 has no application where the individual has consented to the state intrusion upon his or her privacy."

In this case, the accused's s.8 waiver met the high standard required by the case law. He gave express, written consent to the taking of the sample. The trial judge was not "asked to infer consent from conduct or to rely on an unrecorded oral waiver," said Justice Doherty. "There is nothing ambiguous in the language of the written document." He continued:

> Nor did the police say or do anything that could qualify the contents of the document or render its subject matter ambiguous or unclear.
>
> The consent was also voluntary in the sense that it was the product of the [accused's] own free will. He chose to give the consent. There was no unfair or oppressive police conduct that could negate the [accused's] exercise of his own free will. He knew, because he was repeatedly told, that he did not have to give the sample and he chose to give it.
>
> The [accused's] consent was an informed consent in all meaningful ways. He knew he was a suspect in the investigation of three serious sexual assaults. He knew the police would use the sample by comparing it with the samples connected to the crimes. He knew that if the samples "matched", they would provide strong evidence that he committed the sexual assaults and that if they did not match, he would be eliminated as a suspect. The [accused] was also told exactly how the police proposed to take the sample. In short, the [accused] knew what the police wanted, why they wanted it, the jeopardy to which he was exposed, and how the police proposed to take the sample.
>
> The case for the validity of the consent was made stronger by the officers' indication to the [accused], verbally and in writing, that he could speak to counsel before making the decision as to whether to give the consent requested by the police. The [accused] knew when he chose to give the consent that if he wanted to, he could speak to counsel immediately and before deciding whether to give the sample. [paras. 52-55]

Justice Doherty refused to interfere with the trial judge's finding that there had been a valid consent to the taking of the saliva sample.

Right to Counsel

The Ontario Court of Appeal agreed that the interviewing Task Force members had "a

constitutional obligation to advise the [accused] at the beginning of [their interview] that the focus of the questioning was shifting from the stolen van to the sexual assaults and that the [accused] had a right to speak with counsel before being questioned about the sexual assaults." But they did not. They never expressly told him that he had a right to speak to a lawyer before being questioned about the sexual assaults.

Although the trial judge held the police breached the accused's s.10(b) rights when they failed to advise him of his right to counsel as it related to the sexual assault investigation, he did not consider the impact of this prior breach on the accused's waiver of his s.8 rights. In other words, he did not determine whether there was a sufficient connection between the s. 10(b) breach and the giving of the saliva sample to render it potentially inadmissible under s. 24(2) of the *Charter*.

As the wording of s.24(2) suggests, "evidence is potentially inadmissible under s. 24(2) only if it was obtained 'in a manner' that infringed a right or freedom guaranteed by the Charter. If the threshold requirement is met, the ultimate determination of admissibility turns on whether the admission of the evidence could bring the administration of justice into disrepute." The connection between the *Charter* breach and the evidence to satisfy the threshold requirement in s.24(2) can be temporal, causal, contextual, or a combination of the three.

In this case there was a very close temporal connection between the breach and the giving of the sample. "Both occurred in the same interview ... which encompassed both the *Charter* breach and the giving of the sample [and] was conducted by the same officers in the same place," said Justice Doherty. "The officers had the same agenda throughout the interview. They were investigating the sexual assaults and they wanted to obtain the [accused's] consent to the giving of a saliva sample." As well, "[t]he s. 10(b) breach and the giving of the sample must be regarded as part of the "same transaction or course of conduct."

Despite the close temporal and contextual connection, he saw no causal connection. "Nothing said or done by the police in the course of their interview subsequent to the s. 10(b) breach affected the [accused's] ultimate decision to provide the saliva sample. ... [There was] no evidence that the police knowingly and deliberately used constitutionally tainted information to obtain the [accused's] consent to the giving of the saliva sample."

However, Justice Doherty found that something occurred which clearly severed the s.10(b) breach from the taking of the sample, thereby not engaging s.24(2). The police were entitled to make a fresh start by administering "a focused and powerful antidote to their earlier s.10(b) breach" that targeted the saliva sample:

> A determination of whether the police conduct surrounding the waiver effectively disconnected the prior s. 10(b) breach from the giving of the saliva sample requires a consideration of the impact of that police conduct on the purposes underlying the rights created by s. 10(b). The right to counsel exists in large measure to ensure that detained persons are treated fairly. A detained person must be made aware of his or her right to counsel before being questioned by the police so that the detained person might make an informed decision as to whether to speak to counsel and obtain legal advice before potentially incriminating him or herself in response to police questioning. Access to counsel protects detained persons against uninformed self-incrimination.
>
> Insofar as providing the saliva sample is concerned, the purposes underlying s. 10(b) were fully served by the information provided to the [accused] before he chose to consent to the giving of the sample. The [accused] knew the nature and extent of his jeopardy when he agreed to give the sample. He appreciated the potential for self-incrimination and his entitlement to either refuse outright to provide the sample or to speak to a lawyer before making that decision. Whatever may be said about the [accused's] understanding of his circumstances in the broader context of any statements he may have made to the police, when he consented to the taking of the saliva sample, he had a full appreciation of his right to

"The express, unqualified and informed consent to the taking of the sample, provided by the [accused] when he had full knowledge of his s.10(b) rights as they related to the providing the sample, drives a wedge between the giving of the sample and the earlier breach of s.10(b). The informed consent effectively disconnected the decision to give the sample from any potential effect of the prior s.10(b) breach."

> counsel in regard to the taking of that sample and the potential value of that right to him. The [accused] chose to go ahead without speaking to counsel.
>
> .....
>
> The express, unqualified and informed consent to the taking of the sample, provided by the [accused] when he had full knowledge of his s.10(b) rights as they related to the providing the sample, drives a wedge between the giving of the sample and the earlier breach of s.10(b). The informed consent effectively disconnected the decision to give the sample from any potential effect of the prior s.10(b) breach. It cannot be said that the sample was obtained in a manner that violated the [accused's] rights under s.10(b) of the Charter. Consequently, the evidence does not pass the threshold inquiry required under s. 24(2) and the s.10(b) breach cannot justify its exclusion. [paras. 71-74]

The accused's appeal was dismissed and his conviction was upheld.

Complete case available at www.ontariocourts.on.ca

MICHAEL PHELPS & TIGER WOODS: FITNESS & POLICE TRAINING

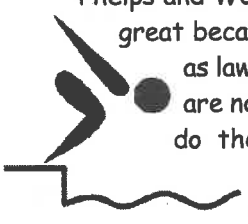
Insp. Kelly Keith, Atlantic Police Academy

Okay, so what do Phelps and Woods have to do with police training? I was reading an article that Michael Phelps is switching the training program he has followed for the past 10 years. This just after winning 8 gold medals!!!!! "Bob [his trainer] said to me that he's going to take everything he's done coaching me and throw it out the door and try something completely different, just to see how it works," Phelps is quoted as saying. "We'll try a bunch of new things. If successful, great. If not, we can go back to what we've been doing." Tiger Woods, in the pinnacle of his career, took time off to remodel his swing and renew his dominance!

If you lift weights and want to continue making gains you must avoid "ROUTINE". There are many ways to alter your program by changing such things as:

- Weight used - Increase weight or even decrease weight and increase time under tension (slow movement down in motion) or increase the repetitions with less weight;
- Repetitions - Instead of doing 8 to 12 reps every workout, each week try changing two body parts and do either 4 to 6 reps or 12 to 15 reps;
- Rest time between sets - Try reducing the rest time or increasing the time and go for heavier weights;
- Pyramid your weights - Start with a heavy weight, then when you can do no more strip some weight off again; when you can do no more strip the weight off and do one last set of the exercise with less weight. You can also pyramid up by starting with light weight and then increase your weight and decrease your reps;
- Rest Days - The "manual" says allow your body part you just worked out 48 to 72 hours rest. How about working legs (or any body part) hard 2 days in a row - shock your muscles every once in awhile. Don't make it a habit to always do this, but changes like this can blast you past that sticking point!;
- Superset - Putting supersets together in some routines is a great way to change it up! Or try doing a set of squats immediately followed by plyometric vertical jumps, or bench presses followed immediately by plate pushes (hold 45 or whatever pound plate straight out in front of you and drive the weight as fast and hard as you can from your chest to your arms outstretched till fatigued). This way the initial exercise squats, bench presses, etc. build strength while the following plyometric exercise builds power; and
- Change body parts worked together - If you work back and chest together and then biceps and triceps the following day etc., change it all up. Work your chest and triceps together and back and biceps together etc.

If you have been doing the same workout routine for to to three months your body will adapt to the program and you will plateau. Don't fall into this trap. Change it up and continue to make progress!



Phelps and Woods are great and will remain to be great because they get the big picture. If we as law enforcement officers and trainers are not constantly looking at new ways to do the same job we become stagnant, while the competition (the crooks) are passing us.

If you as a law enforcement officer or trainer have not taken the time to learn or train for the "ground and pound" game that the criminals are practicing, what happens when you or one of your officers wind up in this position? If you have "one size fits all mentality" in firearms and do not understand that close quarter combat is just as different as distance shooting as physical fighting is at these ranges, what happens when you extend your arms in a close quarter gunfight and utilize breathe control, close one eye and stand in one spot. If you have not trained to get out of a "choke hold" what happens when the criminal who trains or watches mixed martial arts tries his neat new trick on you? We should always have a "tactical open mind". Be open to new and better techniques and put them to the test in the training arena to see if there is any merit to them. If not, just like Phelps, revert back!

Stay fresh, keep searching for new and better ways to do all things and keep making progress.

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

'IN SERVICE' LEGAL ROAD TEST ANSWERS

1. (a) **True**—see *R. v. Nesbeth* (at p. 7 of this publication).
2. (a) **False**—see *R. v. L.T.H.* (at p. 17 of this publication).
3. (b) **False**—see *R. v. Banman* (at p. 20 of this publication).
4. (a) **True**—see *R. v. Simon* (at p. 26 of this publication).
5. (a) **True**—see *R. v. Pomeroy* (at p. 34 of this publication).
6. (b) **False**—see *R. v. Nesbeth* (at p. 7 of this publication)

LEGALLY SPEAKING:

Wilful Blindness

"In brief, the doctrine of wilful blindness provides a means of attributing knowledge to a party whose strong suspicions have been aroused but who refrains from making inquiries to have those suspicions confirmed. The doctrine serves to override attempts to self-immunize against criminal liability by deliberately refusing to acquire actual knowledge.

It is important to keep in mind that the application of the wilful blindness doctrine focuses on the accused's state of mind. Moreover, it applies where the accused not only had a suspicion, but virtually knew the critical fact, and intentionally declined to secure that knowledge. ...

Because of this, the knowledge that is attributed to an accused is subjective in nature. It is distinct from criminal negligence, which is based on an objective component that requires a "marked departure" from the standard of care expected of a reasonable person in the circumstances of the accused ... Wilful blindness is not premised on what a reasonable person would have done, but requires a finding that the accused, with actual suspicion, deliberately refrained from making inquiries because he or she did not want his or her suspicions confirmed. It is only on that basis that the doctrine may be applied. If it is, the knowledge imputed is the equivalent of actual, subjective knowledge.

Accordingly, I see no reason to distinguish between what may be described as a finding of actual knowledge and a finding of knowledge based on wilful blindness. Both provide the same foundation upon which to decide whether the accused acted with intent." – Alberta Court of Appeal Justice Martin, *R. v. Briscoe*, 2008 ABCA 327, at paras. 19-22, references omitted.

OFFICER ACTED IN GOOD FAITH BELIEVING CONSENT VALID

R. v. DiPalma, 2008 BCCA 342

Police received a complaint of a suspected marihuana grow operation at a business complex consisting of three buildings and a total of 55 strata units. Vehicle entry to the complex was controlled by a gate that was open in the day but closed at night and required a key fob to open. An officer met with the complainant, who was a member of the strata council, and was shown two black garbage bags containing marihuana clones and shake that was found in a dumpster at the complex. The officer asked if he could go on the roof of one of the buildings to smell

the vents. A ladder was obtained, and the officer went onto the roof and checked the vents coming from each of the strata units. The officer detected excessive heat, the sound of a blower fan, and the odour of growing or harvested marihuana emanating from two vents of the accused's premises. A search warrant was then obtained for unit 107. Surveillance was set up on the unit and the accused was seen enter and exit. He was pulled over a few minutes later and keys were found on him that were used to open the unit when the warrant was executed. Police found 355 marihuana plants and extensive equipment used in the operation. The accused was charged with producing marihuana and possession for the purpose of trafficking.

During a *voir dire* in British Columbia Supreme Court the officer testified he never considered getting a warrant to search the roof and, in any case, believed he did not have reasonable grounds to get one. Instead, he believed he had lawful permission to climb onto the roof from the strata council member, assuming the complainant had the authority to permit him access to the roof. The Crown argued that the accused did not have a reasonable expectation of privacy in the roof area above the strata unit and therefore could not contest the lawfulness of the search. The accused was not present during the search, he never exercised control over it, did not have exclusive right to determine who had access, and each roof unit was common property. The strata council was responsible for maintaining and repairing the roof and had the right to access it. The accused, on the other hand, submitted the roof was not common property but part of his strata lot.

The Supreme Court judge agreed with the accused. He found the accused had a reasonable expectation of privacy in the roof and that the Crown failed to prove valid consent. The search of the roof was therefore unlawful and the accused's s.8 *Charter* rights were infringed. The evidence, however, was admissible under s.24(2). The evidence was non-conscriptive and its admission would therefore not affect trial fairness. The *Charter* breach was not highly serious and the police acted in good faith. They did not realize their conduct was unlawful and believed they had valid consent to search. The officer "honestly believed that the complainant had provided him with valid consent to search," said the trial judge. "This belief was bolstered in his mind by the fact that the complainant told him he was a strata council member and by the fact that the complainant had keys to locked areas of the complex." Further, the charges were serious and the evidence was crucial to the Crown's case. The exclusion of evidence would be more damaging on the repute of the administration of justice that its admission. The accused was convicted of both charges.

The accused then appealed to the British Columbia Court of Appeal contending the trial judge erred in failing to exclude the evidence obtained from the search of his unit under s. 24(2) of the *Charter*. The accused submitted, in part, that the trial judge only focused on the officer's subjective belief that he had been given valid consent by the complainant to search the roof and failed to consider whether that subjective belief was reasonable in the circumstances. He suggested the trial judge found that there was no evidence that the complainant was a member of the strata council nor any evidence that a member of the strata council could consent to a police search of the roof, therefore the police officer's conduct could not have met the reasonableness requirement. He also pointed out that there were no exigent circumstances that required immediate access to the roof, the officer undertook no investigation of the complainant's status or authority, the officer admitted he had no basic knowledge of the workings of strata plans or strata councils, and the officer admitted he had no grounds to obtain a search warrant before he went up on the roof. Accordingly, he contended that the trial judge erred in concluding that the seriousness of the breach was mitigated by good faith on the part of the police officer and that, since the seriousness of the breach was the critical factor in the judge's s.24(2) analysis, the evidence should have been excluded. Without the officer's warrantless rooftop observations, there were insufficient grounds for the issuance of the search warrant and that without the fruits of the search warrant the Crown had no case. He wanted his conviction quashed or at least a new trial ordered.

The Crown submitted that the trial judge made no error on his ruling in admitting the evidence under s.24(2) and, in any event, submitted the accused did not have a reasonable expectation of privacy in the roof above his unit which would give him standing to challenge the search under s.8 of the *Charter*.

Justice Smith, writing the unanimous Appeal Court judgment, dismissed the appeal. A trial judge's findings under s.24(2) are entitled to deference and an appellate court will only interfere with the trial judge's conclusions if there is an apparent error as to the applicable principles or rules of law or an unreasonable finding.

"The law as it stands requires the police to have a subjective belief that they have consent to search and, as well, proof that the belief was objectively reasonable in the circumstances."

Here, the trial judge did consider whether the officer's belief was reasonably based. He found the officer's subjective belief to be reasonable based on all of the circumstances, including the complainant's statement that he was a member of the strata council and had in his possession keys to locked areas of the strata complex. As well, the officer knew the complainant had an office in the complex and that another property owner in the complex provided him with a ladder to go up on the roof when the complainant asked for it.

And even though the trial judge found the consent to be invalid, the officer's erroneous, but reasonably held belief, was important in considering whether evidence obtained as a result of the seizure should be excluded under s.24(2). In other words, validity of consent addresses whether there was a search at all, not whether the search was reasonable. However, the police officer's perception of the validity of the consent goes to the issue of whether they acted in good faith, which can mitigate the seriousness of a *Charter* violation under s.24(2).

Justice Smith noted there was no "principle or a rule of law that, in all cases, the failure of the police to investigate the scope of their authority to search will operate to exclude the impugned evidence under s.24(2)." In this case, "the law governing the scope of the officer's authority ... [to search a strata-titled business premise] was not clear." Thus, Justice Smith was not satisfied the trial judge erred in holding the officer's belief he was not acting unlawfully was reasonable. He also rejected the accused's argument that the police should conduct a positive investigation when they are relying on a third person's authority to consent. He stated:

> In my view, such a rule of law would unduly fetter the discretion of trial judges under s.24(2) and is neither necessary nor desirable. The law as it stands requires the police to have a subjective belief that they have consent to search and, as well, proof that the belief was objectively reasonable in the circumstances. The fact that a police officer relied on third party consent to search without investigating the third party's authority is a relevant factor in the analysis of the officer's good faith and the seriousness of the s. 8 breach, but these s.24(2) cases come forward in a myriad of factual situations that are not conducive to general rules to be applied mechanically. The weight to be given to this factor in a given case should be left to the judicial discretion of trial judges.
>
> In my view, the reasons given by the trial judge demonstrate that he was aware of the proper approach to the question before him.... This was not a case..., which involved duties of police officers and limits on their authority that had been clearly delineated in the law and of which the particular officers were or ought to have been aware. Here, it cannot be said that [the officer] clearly had no authority to go onto the roof and ought to have known that. The trial judge gave weight to that consideration and gave reasons based in the evidence for his conclusions that [the officer] had an honest subjective belief that the complainant had clothed him with authority and that his belief was reasonable in the circumstances. The judge made no palpable and overriding error and no extricable error in principle has been identified. Accordingly, although his conclusion that the officer acted in good faith may be one on which another judge might within reason disagree, it was a principled conclusion flowing from the application of conventional judicial reasoning to the evidence and the law. As such, it is entitled to our deference. [references omitted, paras. 46-47]

The accused's appeal was dismissed. The Appeal Court however, did not address the Crown's submission that the trial judge erred in concluding that the accused had a reasonable expectation of privacy in the roof top and therefore no standing to assert a s. 8 *Charter* claim.

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

STATEMENTS THAT ARRESTEE HAS NOT EXERCISED s.10(b) RIGHTS NOT TO BE IGNORED

R. v. Badgerow, 2008 ONCA 605

The body of a female murder victim was found lying face down in a creek in 1981. She had a tire over her head and her purse strap was wrapped around her neck. The cause of death was strangulation and drowning. Semen was found on her jeans and in her vagina. In 1997, a police task force formed to investigate a number of unsolved crimes that had taken place in the same area was able to extract a DNA profile from the semen found at the scene of the murder. Forensic testing on a discarded sample from the accused confirmed that his DNA matched the DNA profile of the semen found on the victim's body.

In 1998 the accused was arrested for the murder and another serious offence. During the "high-risk takedown", unmarked police cars boxed in the accused's vehicle he was driving, ordered him from the vehicle at gunpoint, and handcuffed him while he was kneeling on the street. The accused was turned over to an investigator who began audio taping the encounter. The investigator advised the accused of the charges against him, cautioned him and advised him of his right to counsel. The accused said he did not wish to say anything in answer to the charge and wanted to call a lawyer. When asked if he had a particular lawyer in mind, he provided the name "Art Jones" of Mackesy, Smye, Grilli and Jones.

> "Where an accused asks to speak to a particular lawyer on arrest or detention, the police are obliged to give the accused a reasonable opportunity to exercise his or her right to counsel of choice and to hold off in questioning the accused so long as the accused is reasonably diligent in exercising the right."

On arrival at the police station he was strip searched and placed in an interview room. About 30 minutes later the investigator returned to the interview room and began to assist the accused in contacting counsel. He asked to speak to a specific lawyer, clarifying that it was Neil Jones. The investigator found the number in the telephone book and, at the accused's request, dialled the lawyer's home number. However, he was unable to reach Mr. Jones. The investigator then attempted to contact two other lawyers and eventually spoke to one of Jones' partners, Mackesy. After a brief telephone conversation with Mackesy, the accused told the arresting officer that he had instructed Mackesy to keep trying to get in touch with Jones. On being asked by the arresting officer if he was satisfied he had spoken to counsel, the accused said yes, but asked if he could make another call. The arresting officer refused and proceeded to interview the accused. The accused went on to deny any relationship with the victim (which was a fabrication).

At trial in the Ontario Superior Court of Justice the judge rejected the accused's argument that his s.10(b) *Charter* right to a reasonable opportunity to consult counsel of his choice was breached. In the judge's view there was no duty on the police to ensure the accused did consult counsel or receive satisfactory advice. Absent an inquiry by an accused person who has been unable to reach counsel of choice, the police are under no obligation to advise that person that he or she may wait a reasonable time for counsel to call back before asking whether the person wishes to contact another lawyer. The accused had a reasonable opportunity to consult counsel of his choice and it was reasonable for the investigator to assume he had exercised them. And even if the police did breach the accused's s.10(b) rights, the judge found the statement admissible under s.24(2) anyways. The accused was convicted by a jury of first degree murder.

The accused then appealed to the Ontario Court of Appeal. He argued that the trial judge erred in failing to find a s.10(b) *Charter* breach and in not excluding the evidence. "[T]he evidence in this case points inevitably to the conclusion that the police breached the [accused's] s.10(b) rights by failing to give him a reasonable opportunity to consult counsel of his choice and by failing to hold off in questioning him until he had been given that opportunity," said Justice Simmons, writing the opinion of the Court. He observed the duties of the police as follows:

> It is well established that the police have both informational and implementation duties in relation to s. 10(b) of the Charter. Where an accused asks to speak to a particular lawyer on arrest or

> detention, the police are obliged to give the accused a reasonable opportunity to exercise his or her right to counsel of choice and to hold off in questioning the accused so long as the accused is reasonably diligent in exercising the right.
>
> ...there is also ample authority that what the police are required to say and do in a particular case to fulfill their duties under s. 10(b) will depend on what the accused says and does and what the police could reasonably surmise in the circumstances.
>
> Although the police cannot be expected to be mind readers, they are not entitled to ignore statements by an accused that raise a reasonable prospect that the accused has not exercised his or her s. 10(b) rights. Rather, where an accused makes such a statement, the police must be diligent in ensuring that an accused has a reasonable opportunity to exercise his or her rights, and may not rely on answers to ambiguous questions as a basis for assuming that an accused has exercised his or her rights. [references omitted, paras. 44-46]

"Although the police cannot be expected to be mind readers, they are not entitled to ignore statements by an accused that raise a reasonable prospect that the accused has not exercised his or her s. 10(b) rights."

In finding a s.10(b) breach, Justice Simmons concluded the accused was still trying to obtain advice from Jones even after speaking to Mackesy and police failed to give him a reasonable opportunity to consult with counsel of his choice. She stated:

> In this case...the [accused] did not acknowledge being satisfied that he had obtained "proper legal instruction". On the contrary, he acknowledged only that he had spoken to a particular lawyer. Significantly, both immediately before and immediately after acknowledging that fact, the [accused] made statements that raised at least the possibility that he had not exercised his right to counsel. In addition, the fact that the [accused] intended to contact Mr. Jones for the purpose of obtaining advice was confirmed in this case by the evidence of Mr. Mackesy. [para. 39].

And further:

> This was not a situation where there was any urgency in the police interviewing the [accused]. The offence was many years old and there was no evidence of any pressing issues requiring an immediate interrogation. Given this context, it was not unreasonable for the [accused] to ask for a further opportunity to contact his counsel of choice. [para. 48]

As for the accused's statement to the police, it should have been excluded. The statement was conscriptive evidence which will generally render the trial unfair. He was not afforded a reasonable opportunity to consult with counsel of his choice prior to making a statement to the police and was deprived of the opportunity to obtain proper advice that would have allowed him to make an informed choice about whether to speak or not. It was not obvious that the accused intended to make a statement nor did the reliability of the conscriptive evidence obviate the impact on trial fairness.

The accused's appeal was allowed, his conviction set aside, and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

ACTION OR CONTROL DETERMINES DETENTION, NOT POLICE INTENT

R. v. Pomeroy, 2008 ONCA 521

A woman called police after she found her friend missing. The door to her friend's apartment had been kicked open but her friend's purse and personal effects, including cell phone, were still in the apartment. The next day, the missing friend was found floating face down in a river, about 200 yards upriver from the foot of the rear stairway to her apartment building. She had drowned and had extensive blunt force trauma to her head. Her shoulders also showed extreme and deep haemorrhaging consistent with her arms being pulled backward and forced up above her head. Her hands had injuries consistent with offensive wounds received in fighting off an attacker and the case became an investigation into a "suspicious death". Semen found in the victim's mouth and stomach, as well as vomit collected from a catwalk at the rear of the apartment building, was sent in for testing. The police interviewed a number of persons who knew the victim or had contact with her, including the accused, but no arrests were made.

A police officer telephoned the accused and told him they were investigating the death of a girl and that his name had come up in speaking with people in and around the apartment building. He was asked to attend at the police station to give any possible information that he knew about people and things happening around the building. The accused was very cooperative, said he would be right over, and walked to the police station where he was taken to an interview room equipped with video recording equipment. The accused was not cautioned prior to the interview nor informed him of his right to counsel, even though police were aware the accused had been drinking alcohol the night the victim was last seen alive, which was a breach of a condition of his probation. Officers had discussed arresting the accused for failing to comply with his probation order and had intended on doing so, but the fail to comply offence "was far from being the number one reason" for the police wanting to speak to him so they didn't arrest him. The accused provided a statement indicating he was at the apartment building and had seen the victim. A month later, the police received the results of the DNA test showing a match to the accused. He was arrested and charged murder.

"This court has already refused to extend the concept of detention to situations in which the police have authority to detain an individual in their company but have not yet exercised that authority."

At trial in the Ontario Superior Court of Justice, the judge concluded the accused had not been detained by police when he was interviewed about the suspicious death, even though they ultimately intended to arrest and detain him on the breach of probation charge. He was not considered a suspect and the police were trying to gather details about his activities and the names and descriptions of other witnesses who may or may not have been able to assist with the investigation. The suspicious death was the primary reason for the interview while the breach of probation charge was very secondary. He found it was "not incumbent on the officers to prioritize the secondary reason to meet [the accused] so as to require his s.10 rights in relation to the breach of probation charge to be dealt with immediately." If the police had done so, the accused's willingness to cooperate in the suspicious death investigation may have been compromised, diminished or eliminated. Delaying the formal arrest and detention of the accused on the breach of probation charge "was not a violation of his Charter protection, whereas the officers may have jeopardized the full, free, complete and willing exculpatory remarks received from [the accused] concerning the suspicious death, which was paramount, if they had done otherwise." The judge stated:

> The objective of s. 10 is to assure trial fairness and eliminate any disadvantage to a citizen subjected to the direction or control of law enforcement personnel in relation to charges or potential charges against them. Of course, in the discharge of their duties the police may interview anyone while investigating a matter. When someone voluntarily, freely and willingly meets with and provides information to the police in the circumstances disclosed here, the obligations of the police set out in s. 10 regarding an outstanding ancillary offence are not triggered immediately and are properly adhered to when the formal arrest and detention takes place. On the record before me there is no suggestion of compulsion, concern for freedom or unfairness of any kind to [the accused] as to his engagement with the investigating officers in receiving the exculpatory statement he provided. [para. 9]

The accused's statement was admitted and he was convicted of first degree murder and sexual assault by a jury.

The accused then challenged his convictions, arguing before the Ontario Court of Appeal, among other grounds, that the trial judge erred in ruling he was not detained and therefore not entitled to his rights under s.10(b) of the *Charter*. In his view, an individual is physically detained when the police have reasonable grounds to arrest them and have formed an intention to do so. The statement, he contended, should have been excluded under s.24(2) because he was not given his right to counsel before speaking to police.

Justice Weiler, the author of the unanimous Appeal Court, rejected the accused's argument.

Unexercised Authority

Justice Weiler observed that Ontario's highest court "has already refused to extend the concept of detention to situations in which the police have authority to detain an individual in their company but have not yet exercised that authority." A detention may arise in one of three ways:

1) a deprivation of liberty by physical constraint;

2) when the police assume control over the movement of a person by a demand or direction which may have significant legal consequences and which prevents or impedes access to counsel; and

3) in situations where the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist (i.e. psychological detention).

"A physical detention does not depend on the intention of the police but on their action in directing or taking control of a person."

In this case, the accused suggested he was subject to the second type of detention. However, this was rejected by the Court:

> In this case, while the interview took place in the police station, it is important to note that, prior to giving his statement, the [accused] was not deprived of his liberty by physical restraint in the sense that he was neither handcuffed nor placed in a cell; nor was he subject to any form of direction by the police. The police allegedly made a decision to arrest the [accused] but did not act on that decision in the hope that by keeping the relationship on a voluntary basis as long as possible, he might provide information to assist them in their investigation. There is no evidence that the police gave him any demand or direction. There is no evidence that the [accused] believed he had no choice but to comply with the police request to speak with them or that he believed his freedom had been restrained; the [accused] concedes this. As indicated by [one of the officers], the [accused] wanted to be "cooperative". The [accused] understood that he could refuse to answer questions put to him and exercised that right at one point during the interview, refusing to answer whether he had been drinking on the night of August 1, 2002.
>
> The trial judge viewed the videotape and found: that the [accused] was well aware of his rights; that the thrust of the interview was to gather as much detail as to the [accused's] activities as he was able to provide, as well as the names or descriptions of other witnesses; and that all those associated with the building were interviewed. The fact that the police planned to arrest the [accused] for breach of probation after the interview was irrelevant to whether he made an informed choice to talk to them about [the murder victim].
>
> The [accused] submits that the evidence does not support a distinction between the questioning in relation to the murder and the breach of probation because his movements on August 1, 2002 and association with Enright and Harpell were relevant to both. I disagree with this view. At the time, there was no evidence to link the offence of breach of probation, for which the [accused] was going to be arrested, and the suspicious death with respect to which he was being questioned. Further...the execution of the process authorized had not taken place at the time of the questioning. The [accused] has not provided any basis to discount his earlier decision to voluntarily cooperate with the police in their murder investigation simply because the police formed an intention to detain him at a later time on a comparatively minor matter. There is always the possibility that the police may have changed their mind about arresting him for breach of probation. A physical detention does not depend on the intention of the police but on their action in directing or taking control of a person. [paras. 27-30]

Considering All of the Circumstances

Determining whether there has been a detention involves a contextual analysis. Determining whether a detention exists only on one factor, whether an individual is free to leave at the end of an interview, is too narrow an approach, Justice Weiler held. "[There is a] vast body of jurisprudence which requires a contextual analysis and consideration of all the circumstances in determining whether a detention exists." In limiting the analysis of a physical detention to a single criteria as proposed by the accused, "the detention analysis turns entirely on the knowledge or intention of the police. While this is a factor that should be considered in the detention analysis, it should not form the entirety of the analysis," said Justice Weiler. In discussing the contextual analysis required, the Court stated:

While [the knowledge or intention of the police] is a factor that should be considered in the detention analysis, it should not form the entirety of the analysis."

> ... In this case, whether the [accused] was escorted by a police officer or came himself in response to a police request is a consideration relating to physical detention, as is the question of whether the police gave a direction or assumed control over the

[accused]. The stage of the investigation, the nature of police questioning and whether the police had reasonable and probable grounds to believe that the individual had committed the crime being investigated are also relevant factors for consideration in any detention analysis.

"The rights conferred by s.10 are not possessed by the individual who voluntarily chooses to cooperate with police."

The absence of any "compulsion or coercion" by the police, such as a demand or direction, that could be said to constitute an interference with the [accused']s liberty or freedom of action during the course of the interview is a central factor supporting the conclusion that at the time of the interview the [accused] was not detained... Even if, in a broad sense, the [accused] may have been a suspect at that time, that fact alone is not determinative of the question of whether he was detained.... The rights conferred by s. 10 are not possessed by the individual who voluntarily chooses to cooperate with police....

The rights of a person upon arrest or detention under s. 10 of the Charter address specific aspects of the right not to be deprived of liberty and security of the person as protected by s. 7... The broader principle in s. 7 also requires a contextual analysis and further supports my conclusion that, irrespective of the type of detention alleged, a contextual analysis is required. ... [paras. 32-34]

In this case, the trial judge considered all of the circumstances and conducted a contextual analysis. The police were in the early stages of their investigation. DNA, footprint, and fingerprint analyses were still unavailable. The accused, while a person of interest, was not considered a suspect nor was there evidence to conclude that a crime had even occurred. The interview was conducted to gain general information about a "suspicious death" investigation and the accused was not questioned to get incriminating statements. The questioning was general in nature and directed toward obtaining a witness statement. And the police never confronted the accused with evidence pointing to his guilt for sexual assault or murder. Justice Weiler wrote:

[I]n assessing when a detention has occurred for the purpose of the Charter, the focus cannot be limited simply to the time at which the police make a decision to deprive the individual of his or her liberty. That approach improperly limits the entire focus to the perception or intention of the police. Rather, ...a broader contextual analysis that accounts for all relevant factors is required to ascertain whether an individual was detained. Thus, even if, ... the police decided to arrest the [accused] midway through the interview for breach of probation, they did not exercise their power of arrest at that time. A contextual analysis leads me to conclude that the [accused] was not detained during the interview. [para. 38]

And further:

In this case, the nature of the police investigation did not change during the course of the police interview from one that involved mere questioning to acquire information about the suspicious death of [the victim] to one that became adversarial in nature. When the atmosphere is adversarial in nature, the person involved is placed under emotional or psychological pressure ... That was not the situation here. In such circumstances, the police had no obligation to extend to the [accused] his s. 10(b) Charter rights. ... . [para. 41]

The accused was not detained and therefore was not entitled to his right to counsel before being interviewed. His appeal was dismissed and his conviction upheld.

Complete case available at www.ontariocourts.on.ca

LEGITIMATE RANDOM STOP DOES NOT REQUIRE OBJECTIVE EVIDENCE OF OFFENCE

R. v. Miller, 2008 BCPC 133

Police, parked roadside with their emergency lights flashing, noticed a vehicle sitting stationary at a stop sign. Its headlights were on but the vehicle did not proceed. After watching it for about two minutes, police were suspicious that the driver may think the police cars with activated emergency lights meant there was a road check and that was why the driver of the vehicle was not proceeding. The vehicle reversed slowly away from the stop sign and back down a hill out of sight. The vehicle then came slowly forward and back into view, stopped at the stop sign and remained there for several minutes. Police decided to drive towards the vehicle with the emergency lights turned off. As they did so, the vehicle rapidly accelerated, lunging into the intersection, and turned toward them. The vehicle was pulled over.

After approaching the driver, a smell of liquor was detected emanating from the vehicle. The driver had her license and registration already in hand and said she and her passenger had been arguing over leaving a party they had been at that night, explaining why she had remained stopped for so long. The driver admitted consuming at least three drinks, with her last one at 11 p.m. An officer formed grounds the driver had been driving with alcohol in her blood and read her the approved screening device demand from a card. She refused and was subsequently charged with failing to blow into an approved screening device and impaired care or control.

At trial in British Columbia Provincial Court one of the officers testified that, in his experience, drivers avoid roadblocks because they have something to hide, such as driving without a driver's license or insurance, driving while prohibited, or driving under the influence of alcohol or drugs or maybe even because they were driving a stolen vehicle.

Although she agreed police can randomly stop motorists for valid *Motor Vehicle Act* (*MVA*) and road safety related concerns, the accused argued she had been arbitrarily detained under s.9 of the *Charter*. She submitted the stop of her car was not only for a traffic related concern but to exercise general 'preventative policing'. In her view, the police were on a fishing expedition based on their suspicion that her possible desire to avoid a roadblock indicated she had 'something' to hide and that 'something' was not necessarily limited to valid *MVA* related concerns. It was not enough for police to say they pulled the vehicle over for *MVA* concerns, thereby justifying the otherwise arbitrary stop.

Judge Morgan disagreed. British Columbia's *MVA* allows police to randomly stop vehicles for reasons related to driving a car, such as checking for a driver's license and insurance, mechanical fitness and driver sobriety. If, however, the vehicle stop is not related to *MVA* concerns, then the legality of the stop will be determined by way of the common-law criteria. This requires the officer have articulable cause to detain for investigatory purposes.

Here, Judge Morgan observed that the accused was implicitly submitting that a court must find a stop investigatory and beyond the ambit of the *MVA* if there are no objective grounds to substantiate the police officer's stated subjective *MVA* concern. In other words, the accused was suggesting that "before a random single vehicle stop can be justified under section 73 of the Motor Vehicle Act there must be some objective evidence that would support a suspicion that a Motor Vehicle Act offense may be occurring," said Judge Morgan. "To accept this reasoning would result in at least partially incorporating or merging the common-law criteria into the statutory criteria. The effect would be to water down the statutorily authorized random and therefore arbitrary motor vehicle stops for motor vehicle related concerns, and thereby diminish the legislative intent that was upheld by the Supreme Court of Canada." He continued:

> In [this] case there is no evidence the stop was for an improper purpose. I do not find that [the officer's] reference to finding a stolen car when checking vehicles that have apparently avoided police road checks to mean the stop was for the purpose of determining whether the vehicle was stolen. Nor do I find it undermines the Motor Vehicle Act related purposes both officers testified they had.
>
> In [this] case, even if the officers lacked any objective grounds to suggest that a traffic safety related offense was taking place the stop was nevertheless permissible under section 73 of the Motor Vehicle Act. The lack of objective grounds does not in itself suggest that the stop was for an improper purpose.
>
> Furthermore, there was evidence underpinning the officers' stated Motor Vehicle Act traffic safety related concerns. It was 1:30 a.m. on a Sunday morning. It reasonably occurred to the officers that an explanation for the driver's unusual behavior of pausing at a stop sign, not entering onto the main road but waiting for approximately 2 minutes, then backing out of sight for approximately 30 seconds and then pulling back to the stop sign and again waiting for several more minutes, may be related to the possibility that the direction the driver wanted to drive would take her towards two back to back

"[E]ven if the officers lacked any objective grounds to suggest that a traffic safety related offense was taking place the stop was nevertheless permissible under section 73 of the Motor Vehicle Act. The lack of objective grounds does not in itself suggest that the stop was for an improper purpose."

police cruisers with their emergency lights flashing and that the driver was reluctant to approach what would appear to be a roadblock because she was in violation of traffic safety related laws.

Although the stop of [the accused's] vehicle was arbitrary in the sense that the circumstances would not justify detention under the common-law criteria, it was justified under section 73 of the Motor Vehicle Act. I do not find any evidence supporting a suggestion that the detention under the Motor Vehicle Act was a ruse to detain for a coinciding improper purpose. For all these reasons, the detention was not illegal or an unjustified breach of [the accused's] section 9 Charter rights. [paras. 46-49]

The accused was convicted of refusal.

Complete case available at www.provincialcourt.bc.ca

BY THE BOOK:

s.73(1) B.C.'s *Motor Vehicle Act*

A peace officer may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a peace officer who is readily identifiable as a peace officer, must immediately come to a safe stop

ARREST REQUIRES MORE THAN HUNCH

R. v. Peacock, 2008 BCPC 214

Police saw a female passenger exit a van at a gas station to use the pay phone. She waited on the sidewalk, looked up and down, and got back into the van which moved into a neighbouring funeral home parking lot. She got out again, paced up and down the street, and looked nervous. The accused's Honda drove up, the female got in to the passenger side for about 10 seconds, and then went back to the van. The police followed the Honda to another gas station, where it parked, and another female got into the passenger side for about ten seconds. The car was subsequently stopped, the accused was arrested the accused and a search resulted in the discovery of a quantity of drugs, cash, a ringing cell phone, and score sheets. He was charged with possessing cocaine for the purpose of trafficking.

At trial in British Columbia Provincial Court two police officers testified they believed that a drug transaction had taken place on viewing the first interaction. They were suspicious when the woman used the pay phone and anticipated a "dial-a-doper" would arrive. The judge found the officers had the subjective belief that an offence was being committed, but the belief was not objectively justified. "[The officers had] no prior involvement or knowledge of the accused, his car, or the two women involved," said Judge Routhwaite. "They did not hear anything at the pay phone, and there is no evidence connecting the accused with the call. They did not see anything exchanged in the car, nor in the women's hands upon their departure. They made no attempt to stop and search either woman, and at least one of the officers acknowledged the possibility of various other innocent activities. In short, the police saw two interactions where women briefly got into the passenger side of the accused's car, and nothing more. Those observations, in light of all of the information available to the police, were equally consistent with other innocent activities as they were with potential drug trafficking." In concluding the police lacked reasonable grounds to make the arrest, the judge stated:

In arresting the accused, the police were acting on hunch or intuition, not reasonable probability. The sole purpose of the arrest was to continue the investigation of that hunch. Lacking reasonable and probable grounds, the arrest was unlawful and the detention arbitrary, in breach of s. 9. The search of the vehicle was incidental to the unlawful arrest, and accordingly in breach of s. 8. [para. 9]

The evidence was excluded under s.24(2) of the *Charter*. Although the evidence for this serious charge was non-conscriptive and essential to the Crown's case, the arrest, detention, and search was a serious breach of the accused's rights. The police did not have a reasonable basis or justification and lacked good faith; they were ignorant as to the scope of their authority. As well, they could have done more surveillance or investigated the suspected purchasers. If the evidence was admitted, the judge was of the opinion she would be condoning unacceptable police conduct which would bring the administration of justice into disrepute.

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