JIBC IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

NEW LAW

On April 29, 2011 Bill S-9 came into force. This Bill amended the *Criminal Code* to create a separate punishment for theft of motor vehicle. Unlike the punishment for "regular" theft found in s. 334 of the *Criminal Code*, the punishment for theft of motor vehicle contains a mandatory minimum jail sentence of six months if the charges are proceeded by indictment and it is the person's third or subsequent conviction. The new provision reads:

Motor vehicle theft

333.1 (1) Everyone who commits theft is, if the property stolen is a motor vehicle, guilty of an offence and liable

(a) on proceedings by way of indictment, to imprisonment for a term of not more than 10 years, and to a minimum punishment of imprisonment for a term of six months in the case of a third or subsequent offence under this subsection; or

(b) on summary conviction, to imprisonment for a term of not more than 18 months.

Subsequent offences

(2) For the purpose of determining whether a convicted person has committed a third or subsequent offence, an offence for which the person was previously convicted is considered to be an earlier offence whether it was prosecuted by indictment or by way of summary conviction proceedings.

In determining whether it was a third or subsequent offence only convictions under the new s. 333.1 apply. Previous theft convictions under s. 334 of the *Criminal Code* where the subject matter of the theft was a motor vehicle do not qualify.

A new crime of "tampering with vehicle identification number" was also added. This offence makes it illegal to alter, remove, or obliterate a motor vehicle 's VIN:

353.1 (1) Every person commits an offence who, without lawful excuse, wholly or partially alters, removes or obliterates a vehicle identification number on a motor vehicle.

Definition of "vehicle identification number"

(2) For the purpose of this section, "vehicle identification number" means any number or other mark placed on a motor vehicle for the purpose of distinguishing it from other similar motor vehicles.

Exception

(3) Despite subsection (1), it is not an offence to wholly or partially alter, remove or obliterate a vehicle identification number on a motor vehicle during regular maintenance or any repair or other work done on the vehicle for a legitimate purpose, including a modification of the vehicle.

Punishment

(4) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) is guilty of an offence punishable on summary conviction.

These new offences apply prospectively, meaning charges under these sections can only be laid if the offence was committed on or after the day the provisions came into force.

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Highlights In This Issue

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

Continued from cover. "Motor vehicle" is defined in s. 2 of the *Criminal Code* as meaning "a vehicle that is drawn, propelled or driven by any means other than muscular power, but does not include railway equipment." There are several other *Criminal Code* offences specifically mentioning motor vehicles. These include:

- s. 94 - Unauthorized possession of a firearm, prohibited weapon, or restricted weapon in a motor vehicle
- s. 98 - Break and enter a motor vehicle to steal a firearm
- s. 213 - Stopping a motor vehicle for the purpose of engaging in prostitution
- s. 244.2 - Discharging a firearm into or at a motor vehicle
- s. 249 - Dangerous operation of a motor vehicle
- s. 249.1 - Flight from police while operating a motor vehicle
- s. 249.4 - Dangerous operation of a motor vehicle while street racing
- s. 253(a) - Operate motor vehicle while impaired
- s. 253(b) - Operate motor vehicle over 80 mg%
- s. 259 - Operate motor vehicle while disqualified
- s. 335 - Take motor vehicle without consent
- s. 335 - Occupant of motor vehicle knowing it was taken without consent
- s. 351 - Possess motor vehicle break-in instrument

JUSTICE INSTITUTE of BRITISH COLUMBIA LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

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

Becoming a master manager: a competing values approach.

Robert E. Quinn ... [et al.].

Hoboken, NJ: Wiley, c2011.

HD 57.7 B43 2011

Career flow: a hope-centered approach to career development.

Spencer G. Niles, Norman E. Amundson, Roberta A. Neault.

Boston, MA: Pearson, c2011.

HF 5381 N548 2011

Cite right: a quick guide to citation styles - MLA, APA, Chicago, the sciences, professions, and more.

Charles Lipson.

Chicago, IL: University of Chicago Press, 2011.

PN 171 F56 L55 2011

Communication essentials. Speaking essentials. [videorecording]

Hamilton, NJ: Films for the Humanities & Sciences; Orangeville, ON: McIntyre Media [distributor], c2010. videodisc (DVD) (20 min.): sd., col.; 4 3/4 in.

This program shows students ways to overcome the fear of public speaking and transform it into positive energy. These include thorough preparation (from learning the wants and needs of the audience to scoping out the location at which the speech will take place) as well as starting with a strong opener, finding the right pace, using nonverbal communication, and more.

BF 637 C45 C6648 2010 D1147

Communication essentials. Reading essentials. [videorecording]

Hamilton, NJ: Films for the Humanities & Sciences; Orangeville, ON: McIntyre Media [distributor], c2010. videodisc (DVD) (20 min.): sd., col.; 4 3/4 in.

With simple methods for tackling an immense volume of content, this program helps students manage workplace reading tasks quickly and efficiently without overlooking important information. Featured tips show viewers how to stay focused, prioritize reading matter, and create a comfortable reading environment, while making the best use of tables of contents, indexes, sub-headings, and more.

BF 637 C45 C6647 2010 D1146

Communication essentials. Writing essentials. [videorecording]

Hamilton, NJ: Films for the Humanities & Sciences; Orangeville, ON: McIntyre Media [distributor], c2010. videodisc (DVD) (20 min.): sd., col.; 4 3/4 in.

This program shows how effective written communication is possible for anyone, even those who struggle to complete a simple fax or e-mail. Methods for improvement include gauging the needs of the reader, keeping prose short and simple, emphasizing benefits, avoiding jargon and overblown language, employing a confident yet respectful tone, and more.

BF 637 C45 C6649 2010 D1148

Dealing with difficult people.

Roy Lilley.

London, UK; Philadelphia, PA: Kogan Page, 2010.

HF 5548.8 L493 2010

Diagnosing and changing organizational culture: based on the competing values framework.

Kim S. Cameron, Robert E. Quinn.

San Francisco, CA: Jossey-Bass, 2011.

HD 58.8 C32 2011

Difficult conversations: how to discuss what matters most.

Douglas Stone, Bruce Patton, Sheila Heen.

New York, NY: Penguin Books, c2010.

BF 637 C45 S78 2010

Doing & saying the right thing.

Edmonton, AB: Sextant, 2009.

HD 61 B66 2009

Doing business in tough times: proven strategies that work. [videorecording]

Burnaby, BC: Canada Wide Media Limited [distributor], c2010. videodisc (DVD) (108 min.): sd., col.; 4 3/4 in.

Are you worried about the state of the North American economy? In this presentation, discover how you can weather the economic storm. On this DVD, you will learn Peter Legge's 97 tips on how to do business in tough times -- these back-to-basics tips are essential for business leaders searching for ways to sharpen their focus and secure the profitability and long-term success of their personal and professional lives. The key tenets of success invariably come back to the simple, basic principles encompassed in these 97 tips. Learn them, use them and stick to them.

HD 5351 D653 2010 D1105

Engaging the online learner: activities and resources for creative instruction.

Rita-Marie Conrad, J. Ana Donaldson.

San Francisco, CA: Jossey-Bass, 2011.

LB 1028.5 C623 2011

The EQ edge: emotional intelligence and your success.

Steven J. Stein, Howard E. Book.

Etobicoke, ON: J. Wiley & Sons Canada, 2011.

BF 576 S733 2011

The ethical imagination: journeys of the human spirit.

Margaret Somerville.

Toronto, ON: House of Anansi Press, c2006.

BJ 1581.2 S65 2006

Facility emergency management. [videorecording]

Edgartown, MA: Distributed by Emergency Film Group, 2010. videodisc (DVD) (28 min.): sd., col.; 4 3/4 in. ; + 1 CD-ROM (4 3/4 in.).

This program will help facilities develop an emergency plan to be used at incidents of all sizes, whether inside or outside of the facility. Topics covered include the following: developing an emergency management structure; the role of the emergency management team; setting up the Emergency Operations Center (EOC); procedures for interfacing with local and regional response personnel; appropriate response to different levels of incidents; mitigation and prevention; preparedness; response; recovery; and the Incident Command System (ICS).

HV 551.3 F234 2010 D1061

FireStarter collection. [videorecording]

[Burnsville, MN]: ChartHouse Learning, p2006, c1998. videodisc (DVD) (46 min.): sd., col.; 4 3/4 in. + facilitator guide (59 p.).

Sometimes we make prisons out of companies and corporations, David Whyte says, by the way we choose to work in them. Only free people can supply the energy, enthusiasm, commitment and audacity that organizations need to succeed. But how free can we feel if our desire for financial rewards or market share becomes so powerful that it forces us to submerge our need to be happy, creative and imaginative? At what point are we controlled by our work, rather than fulfilled or challenged by the opportunity to make a difference, to grow and discover wonderful new things about ourselves? Organizations may create environments that encourage a sense of this freedom, but true freedom comes from inside human beings who are willing to ask if what we do every day is contributing to the world.

HD 53 F573 2006 (Restricted to in-house.) D1138

GRE graduate record examinations.

New York, NY: Kaplan, c2011.

Offers strategies and techniques to help maximize performance, and includes two full-length practice tests.

LB 2367.4 G725 2011

The Googlization of everything: (and why we should worry).

Siva Vaidhyanathan.

Berkeley, CA: University of California Press, c2011.

HD 9696.8 U64 G669 2011

How remarkable women lead: the breakthrough model for work and life.

Joanna Barsh and Susie Cranston and Geoffrey Lewis.

New York, NY: Crown Books, 2009.

BF 637 L4 B36 2009

Illuminating the path.

James J. Thomas and Kristin A. Cook, editors.

Los Alamitos, CA: IEEE Computer Society, 2005.

TK 7882 I6 I45 2005

Insidious workplace behavior.

[edited by] Jerald Greenberg.

New York, NY: Routledge, c2010.

HF 5549.5 E42 I55 2010

Making the grade: preventing downhill runaways. [videorecording]

[New Westminster, B.C.]: Justice Institute of British Columbia : PTEC, 1997. videodisc (DVD) (14 min.): sd., col.; 4 3/4 in.

Downhill runaways are preventable. This DVD reviews the measures that can be taken by professional truck drivers to reduce the likelihood of becoming involved in a downhill runaway. Most runaways are caused by driving too fast for the grade or travelling with brakes that are out of adjustment. To prevent a downhill runaway, you should conduct a daily pre-trip inspection; confirm brakes are adjusted; plan the descent; determine a safe descent speed; and if necessary, use the runaway lane. This DVD takes you through the process and highlights key points to remember.

HE 5614.5 C26 M254 1997 D1193

The managed heart: commercialization of human feeling.

Arlie Russell Hochschild.

Berkeley, CA: University of California Press, 2003.

BF 531 H62 2003

Mind-body workbook for PTSD: a 10-week program for healing after trauma.

Stanley H. Block & Carolyn Bryant Block.

Oakland, CA : New Harbinger Publications, c2010.

RC 552 P67 B63 2010

A new kind of monster: the secret life and chilling crimes of Colonel Russell Williams.

Timothy Appleby.

Toronto, ON: Random House Canada, 2011.

HV 6248 W54 A66 2011

On becoming a leader.

Warren Bennis.

New York, NY: Basic Books, c2009.

BF 637 L4 B37 2009

Organizational stress management: a strategic approach.

Ashley Weinberg, Valerie J. Sutherland, and Cary Cooper.

Basingstoke, Hampshire [England]; New York, NY: Palgrave Macmillan, 2010.

HF 5548.85 W38 2010

The perfect online course: best practices for designing and teaching.

edited by Anymir Orellana, Terry L. Hudgins, and Michael Simonson.

Charlotte, NC: IAP, Information Age Pub., c2009.

LB 1028.38 P47 2009

Physics of bullying: a new approach to bullying intervention using the laws of conservation and symmetry. [videorecording]

[Kaslo, BC]: Heartspeak Productions, c2009. videodisc (DVD) (40 min.): sd., col.; 4 3/4 in.

Thousands of children avoid school each day for fear of being persecuted by their peers; countless more dread it for the same reason. This timely, insightful, and truly practical DVD shows parents, teachers, administrators, and community leaders how to begin creating healthier, safer communities.

BF 637 B85 P493 2009 D1151

Presentation is everything. [videorecording]

Mississauga, ON: RG Training Resources [distributor], p2010, c2007. videodisc (DVD) (17 min.): sd., col.; 4 3/4 in.

Help individuals structure and deliver effective presentations: and avoid death by PowerPoint. We've all sat through presentations that have left us shell-shocked, bored or baffled. A poorly delivered presentation can leave us feeling confused, and the

presenter feeling dejected. A well thought through presentation can fill the presenter with confidence that they've got the message across in an interesting and engaging way. Alan (Matthew Horne) is an old hand at presentations. He's given more than he cares to mention: and more than his audiences care to remember! Cue Christine (Sally Philips) to help him reflect on his less glorious efforts and help him think through his preparation, structure and style to ensure that everyone leaves his presentations understanding what he was trying to tell them.

HF 5718.22 P744 2010 D1125

The power of pull: how small moves, smartly made, can set big things in motion.

John Hagel III, John Seely Brown, Lang Davison.

New York, NY: Basic Books, c2010.

Explains the principles of "pull" and how to effectively apply it to individuals and organizations to increase organizational and social change and develop creative talent.

HD 58.7 H334 2010

Reena Virk: critical perspectives on a Canadian murder.

edited by Mythili Rajiva and Sheila Batacharya.

Toronto, ON: CSPI, 2010.

HV 6535 C33 V53 2010

Research and evaluation in education and psychology: integrating diversity with quantitative, qualitative, and mixed methods.

Donna M. Mertens.

Los Angeles, CA: Sage, c2010.

LB 1028 M3964 2010

Research methodology: a step-by-step guide for beginners.

Ranjit Kumar.

Los Angeles, CA; London, UK: SAGE, 2011.

H 62 K84 2011

The subtlety of emotions.

Aaron Ben-Zeev.

Cambridge, MA: MIT Press, c2000.

BF 531 B43 2000

The survivor personality: why some people are stronger, smarter, and more skillful at handling life's difficulties - and how you can be, too.

Al Siebert ; contributing editors: Kristin Pintarich and Molly Siebert.

New York, NY: Perigree, 2010.

BF 637 L53 S54 2010

Toxic talk: what would you say? [videorecording]

Bensenville, IL: Learning Communications; Mississauga, ON: RG Training Resources [distributor], c2009. videodisc (12 min., 22 sec.): sd., col.; 4 3/4 in. + CD-ROM (4 3/4 in.)

Gossip, gripes, and rumors have become a national past time in the workplace. Unfortunately, these forms of toxic talk can have serious repercussions for your employees, your managers and supervisors, and for the profitability and productivity of your entire organization. Relationships and camaraderie at work are essential for an engaged workforce. However, the examples depicted in this training toolkit have crossed the line and have become damaging to employee relationships, employee morale and productivity. Whether your organization already has a policy on toxic talk or you're just beginning to look at the effects damaging communication has on your productivity, this program is designed to give your organization a chance to discuss some real issues affecting your workforce. Using three open-ended scenarios (two videos and one audio), the training design focuses on how to respond if you become engaged in toxic conversation and helps participants to redirect potentially hazardous communication. The activities also help participants understand the different perceptions of those involved in toxic talk and how others are affected by this behaviour.

HF 5718 T698 2009 D1192

What's holding you back?: ten bold steps that define gutsy leaders.

Robert J. Herbold.

San Francisco, CA: Jossey-Bass, c2011.

HD 30.23 H48 2011

TWO SUPREME COURT JUDGES TO RETIRE

On May 13, 2011 The Right Honourable Beverley McLachlin, Chief Justice of Canada, announced that Justice Ian Binnie and Justice Louise Charron have written to the Minister of Justice, the Honourable Robert Nicholson, to inform him that they will retire from the Supreme Court of Canada. Justice Charron's retirement will be effective August 30, 2011. Justice Binnie's retirement will take effect upon the same date or, if there is a delay in the nomination process, so soon thereafter as his replacement is appointed. The *Judges Act* provides that a judge of the Supreme Court of Canada may, for a period of six months following his or her retirement, continue to participate in judgments with respect to cases heard prior to retiring.

"The departure of Justices Binnie and Charron will leave an important void on the Court. Both have served the Court with great wisdom and dedication and have made significant and lasting contributions to the administration of justice in Canada. They are valued colleagues and friends. We will miss them," said Chief Justice McLachlin.

For his part, Justice Binnie said, "It has been an honour and a privilege to serve on the Supreme Court of Canada since January 1998. Much as I will miss the work and my colleagues, I am now well into my fourteenth year on the Court and the time has come to return to Toronto to pick up some of the threads of an earlier existence. I deeply appreciate the opportunities given to me to participate in the administration of justice in so many different capacities over more than 44 years and I thank those who from time to time made it possible".

Justice Charron said, "I feel truly privileged to have spent the last years of my judicial career serving the Canadian people as a member of the Supreme Court of Canada. As promised when I took the oath of office, I have brought to this task my best, every day, whatever that could be at the time. I hope that I have lived up to the trust and honour that was bestowed upon me. The reasons for my decision to retire are quite simple. I have recently turned 60. My husband and I both enjoy good health. We have a great family and wonderful friends. I have been a judge for 23 years now and the seventh anniversary of my appointment to the Court, August 30 next, seems like the perfect time to move on".

Justice Binnie was appointed to the Supreme Court of Canada on January 8, 1998, after a distinguished career as an advocate in courts and tribunals across Canada and before the International Court of Justice at The Hague. Justice Charron was appointed to the Supreme Court of Canada on August 30, 2004, after having served on the Ontario Court of Appeal, the Ontario Court of Justice (General Division) and the District Court of Ontario.

Chief Justice McLachlin concluded saying "I am certain that the Canadian government will give priority consideration to the appointment of two new justices of the Supreme Court with all the care and deliberation that is required in the circumstances."

CERTAINTY NOT REQUIRED FOR REASONABLE GROUNDS: ODOUR SUFFICES

R. v. Ashby, 2011 BCSC 513

At about 3:20 pm a police officer saw a vehicle travelling 94 km/h in an 80 km/h zone and driving outside the tracks that had been made in the snow by other vehicles. The driver's window was down about one-quarter the way and the sun roof was open part-way, even though it was -21 Celsius. The accused was pulled over and asked for her driver's licence and registration. The vehicle was a rental vehicle and the officer noted a strong odour of vegetative green marihuana, similar to the smell of marihuana in a grow operation. He noted a red bag on the passenger's seat, fast food wrappers on the floor, and an odour of men's cologne in the vehicle. A computer search revealed that the accused had a conviction for possessing marihuana about 12 years earlier. When the officer returned to the vehicle he again noted a strong odour of vegetative marihuana and arrested the accused for

possessing marihuana. He also advised her of the right to counsel. Approximately 21 kgs. of marihuana was found in the trunk of the vehicle and about $17,000 was found in the travel bag on the front passenger seat. The accused was subsequently charged with possession for the purpose of trafficking.

> "The strong odour of vegetative marihuana in this case, however, was sufficient on its own to support a reasonable belief that [the accused] was in possession of marihuana, or had committed the indictable offence of being in possession of marihuana."

At trial in British Columbia Supreme Court the officer testified that he had reasonable grounds to arrest the accused:

- She was driving a rental vehicle and drug couriers often use someone else's car to avoid detection and seizure of their own car. It also allows a driver to deny knowledge of the drugs that may be found in the vehicle;
- The smell of male cologne was important because in his experience it is often used to mask the smell of marihuana in a vehicle;
- The fast food wrappers on the floor were important because in his experience people couriering marihuana do not wish to stop for very long, or to leave their car in order to eat and, therefore, may pick up food from drive-through or fast food restaurants and leave the wrappers in the vehicle;
- The window and sun roof were open. It was -21 Celsius and he believed the accused may be trying to vent the smell of the marihuana from the vehicle;
- There was a strong smell of vegetative marihuana;
- The officer had experience in dealing with marihuana in the past. He had been involved in the dismantling of approximately 10 indoor grow operations and five outdoor grow operations. He had made several stops of vehicles in which he had smelled burned marihuana or marihuana bud. When he searched these vehicles he had found marihuana in the vehicles. The officer was also able to distinguish between the smell of burned marihuana, marihuana buds, and marihuana plants.

The accused challenged the legality of the arrest by attacking the officer's reasonable grounds. If the arrest was unlawful then the search incidental to that arrest would be unreasonable and a breach of s. 8 of the *Charter*. She argued many things, including:

- The officer did not have reasonable grounds to believe that she had committed an indictable offence;
- The officer did not find her committing a criminal offence;
- The officer, at most, might have had a suspicion. There were other reasonable alternate explanations for the rental vehicle, smell of cologne, fast food wrappers and the window being open. Even the strong smell of vegetative marihuana with the other factors did not meet the requirement of reasonable grounds to believe that the accused was in possession of marihuana;
- The officer was not in a position to know whether the quantity exceeded 30 grams and could not know whether it was strictly a summary offence or an indictable offence; and
- The officer should have believed on reasonable grounds that the public interest could be satisfied without arrest and that he had no reasonable grounds to believe that if he did not arrest the accused she would fail to attend court in order to be dealt with according to law, thus rendering the arrest unlawful under s. 495(2).

Following a thorough canvassing of the case law on odour cases, British Columbia Supreme Court Justice Powers concluded the arrest was lawful:

> In the circumstances of this case, did the officer have reasonable grounds to believe that [the accused] had committed an indictable offence or was committing an offence? A number of the indicators are neutral and by themselves may simply raise a suspicion. However, the strong odour of vegetative marihuana gives added

significance to those factors as well. The strong odour of vegetative marihuana in this case, however, was sufficient on its own to support a reasonable belief that [the accused] was in possession of marihuana, or had committed the indictable offence of being in possession of marihuana. It is not necessary that all other explanations be eliminated.

It is true that the officer could not "know" or be sure or certain that an offence had been committed or was being committed. However, it is not necessary that he be certain. The officer must subjectively believe and have reasonable grounds to believe that the offence had been committed or be able to, based on his own observation, reach a reasonable conclusion that an offence was being committed. The officer may not "know" or be sure until his search revealed the evidence, but in this case the strong smell of vegetative marihuana was, in my opinion, a strong indicator based on his own observations which led the officer to believe that he found [the accused] committing an offence. He did agree in cross-examination that he could not be sure or certain of his conclusions. He did acknowledge to [the accused] that if he was wrong and he did not find the marihuana that he believed was there, that he would release her.

.....

[The accused] also argues that when she was removed from her own vehicle it should have become apparent that the odour was really emanating from her, rather than the vehicle. She argues that when the officer did a quick search of her and did not find any marihuana, he should have re-assessed his findings and, if he had done so, would have concluded that he no longer had grounds to arrest her or to search her vehicle. [The accused] argues that he should have then released her and not continued with his search. I disagree. The officer had made an arrest on reasonable grounds and on the belief that [the accused] was in possession of marihuana. Simply because he did not find the marihuana immediately upon her person would simply indicate that it was somewhere else, and that is in her vehicle. In determining whether the officer's actions were reasonable I need to consider the circumstances in which they occurred, including the fact that he had just arrested her on the side of the road and had just began his search. It would be unreasonable to subject his actions to a moment-by-moment review, or to require the officer to do so. [emphasis added, paras. 94-97]

"It is true that the officer could not "know" or be sure or certain that an offence had been committed or was being committed. However, it is not necessary that he be certain. The officer must subjectively believe and have reasonable grounds to believe that the offence had been committed or be able to, based on his own observation, reach a

And further:

The police have the power to arrest somebody if they have reasonable grounds to believe that the person has committed or is about to commit an indictable offence (s. 495(1)(a) of the Code). They may also arrest somebody if they find someone committing a criminal offence (s. 495(1)(b), subject to s. 495(2) and (3)). In this case, the reasonable grounds consisted of the constellation of factors I have referred to earlier, particularly in light of the "strong smell of vegetative marihuana". The police officer could not know or be sure that [the accused] was in possession of marihuana, but certainly had reasonable grounds to believe she was. This was not the kind of case where the officer suspected he would only find minimal amounts making it a purely summary offence. The power to arrest under s. 495(1)(a) that relates to indictable offences includes hybrid offences which may be prosecuted by indictment or summarily.

If the quantum of marihuana was less than 30 grams it would be a summary offence (Section 4(4) and (5) and Schedule VIII(2) of the CDSA). Even if it were successfully argued that because the police officer could not be sure that the quantum was over 30 grams, he had reasonable grounds to believe that he was dealing with a summary offence. I am satisfied that he found [the accused] "committing a criminal offence" based on his own observations; that is, the

> strong smell of vegetative marihuana. It is true that there were alternate explanations for the strong smell, such as [the accused] having been in the midst of a grow operation prior to being stopped by the police. However, the conclusion that she was at the time committing an offence, need not be the only conclusion that the observations of the officer supports, but it must be a rational one. In this case I find it was a rational conclusion.
>
> Even if the officer could only say that he had found her committing a summary convictions offence, the arrest was appropriate pursuant to s. 495(2) and (3), the need to secure or preserve evidence or to prevent the continuation of the offence. [paras. 113-115]

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

PROTECTIVE SEARCH BECAME AN INVESTIGATIVE ONE: s. 8 CHARTER BREACHED

R. v. Phengchanh, 2011 BCSC 484

A police officer saw that the side mirror of a vehicle was damaged (contrary to s. 7.04 of the *Motor Vehicle Act Regulations*) and decided to pull it over and give the driver a notice and order requesting it be repaired within a few days. The officer broadcast the location of the stop and the licence plate was queried on CPIC. The vehicle was insured and not stolen. However, PRIME disclosed that the vehicle was involved in a "kidnapping and forcible confinement" in 2005 or 2006, and had been the subject of a street check during the same time. A sergeant covered on the call and when the vehicle was pulled over the accused was the lone occupant. He was advised of the reason for the stop and produced his licence and registration as requested. He was very, very nervous and did not make eye contact with the officer. A further PRIME check revealed the accused was involved with drugs and an Asian Gang. He was asked to get out of his vehicle because the officer wanted to conduct a pat down search before giving the notice and order. He complied, was patted down by the sergeant, but no weapons were found. A search of the driver's seat area was then conducted but no weapons were found here either. However, a box-like area below the driver's seat was located. This was something the officer had never seen before in any car. The back door of the car was opened to examine this box-like area and a flap of heroin was discovered in the foot well of the back seat where a passenger would usually sit. The accused was arrested for possessing heroin and a police dog did a thorough search of the vehicle. Two more flaps of a narcotic and a holster, which held an unloaded .38 calibre Beretta pistol and two magazines, were found in the airbag area. The accused was charged with weapons and drug offences.

The Stop - Lawful

The judge found the stop was a lawful exercise of police authority. It resulted from the officer observing a potential violation of s. 7.04 of the *Motor Vehicle Act Regulations*. It was not a ruse for some other investigation. Thus, it was not arbitrary and did not breach s. 9 of the *Charter*.

The Pat-Down - Lawful

The judge also found the pat down search to be lawful. "I am also satisfied that, from an assessment of all of the known facts and circumstances of the situation, including reasonable inferences that might be drawn from the information [the officer] obtained from the PRIME database, [she] had reasonable grounds, both subjectively and objectively, to conduct the accused's 'pat down' protective safety search."

The Vehicle Search - Unlawful

The judge found the vehicle search for safety was not reasonable. He held that the officer's subjective belief in the need for a search of the vehicle for officer safety was not objectively reasonable. "In my view, the protective search for officer safety became an investigative search to locate evidence when [the officer] began the search of the driver's side of the accused's vehicle," said the judge. "At that time, the accused was already outside of his vehicle and had already been subjected to a 'pat down' search by

[the sergeant]. Therefore, the search of the accused's vehicle lost its lawful character as incidental to detention." Thus the search breached s. 8.

Admissibility

The evidence was excluded. The officer was not acting in good faith. "Good faith cannot be claimed if a Charter violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority." The search was intrusive and "the public also expects those engaged in law enforcement to respect the rights and freedoms we all enjoy by acting within the limits of their lawful authority."

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

CONCURRENT CRIMINAL LAW PURPOSE DOES NOT NECESSARILY INVALIDATE REGULATORY SEARCH

R. v. Sandhu, 2011 ONCA 124

A citizen spotted the accused's tractor trailer parked beside a passenger vehicle in a private area of a transport terminal lot. He noticed items being loaded from the passenger vehicle into the back of the trailer. As the citizen drove nearby, the tractor-trailer and the passenger vehicle drove away, leaving the lot and travelling in opposite directions. The citizen followed the tractor trailer and was able to force it to stop. Coincidentally, a Ministry of Transportation officer saw what was happening and drove up behind the tractor-trailer, activated his flashing lights, and decided to inspect the transport truck. The police were called to assist. During a conversation with police the accused made reference to a firearm, stating that someone "had put a gun to his head and told him that he had to put things into the back of his tractor-trailer truck." Then, purportedly acting under the inspection provisions found in Ontario's *Highway Traffic Act* [*HTA*], the rear doors of the trailer were opened. No consent was obtained nor was consideration given to getting a warrant. In the trailer were shrink-wrapped pallets of baby carrots and nine bales wrapped in dark plastic. Police opened one of the bales with a knife to examine its contents, found drugs, and arrested the accused. A search warrant was subsequently obtained and executed. As a result 205 kgs. of cocaine were seized and the accused was charged with possessing cocaine for the purpose of trafficking.

At trial in the Ontario Superior Court of Justice the Crown argued that the initial inspection of the trailer was authorized under s. 216.1 of the *HTA*, which permits an officer to examine, at any time, a commercial vehicle, its contents and all documents relating to the ownership and operation of the vehicle to determine whether legislation relevant to commercial vehicles is being complied with. However, the Crown conceded that cutting into the bale breached s. 8 of the *Charter* since it was done without a warrant. But the trial judge ruled that the initial search was not authorized under s. 216.1 and, since the evidence was obtained from a *Charter* violation, the evidence was presumptively inadmissible. The Crown had failed to discharge its onus of demonstrating that the cocaine was admissible under s. 24(2). The judge held that the Ministry officer never had a simple *HTA* inspection in mind and, even if he did, his intention was superseded by criminal law concerns once the accused spoke about a gun. Further, he found it incredible that the officers could have believed their actions were in furtherance of an enforcement inspection rather than a criminal investigation. The *Charter*-infringing conduct was at the more serious end of the spectrum, and the warrantless search was intrusive, invasive, and done knowing a warrant was required. Although the evidence was real and reliable, the charge serious, and exclusion would end the prosecution, the judge nonetheless excluded it. "I conclude ... that it ought to be evident to any fair and right thinking person who seeks to uphold the core values of our judicial system, that the admission of the illegally obtained evidence in this case extracts a small, albeit meaningful, toll on the truth seeking goal of the criminal trial, as compared to the damage that would be caused to the long-term respect and belief of Canadians in the rule of law and their confidence that it binds both citizen and state in equal measure, as would be the case if that evidence were to be admitted in the face of

such arrogant and abhorrent state conduct," he said. The accused was acquitted.

The Crown appealed to the Ontario Court of Appeal arguing that the trial judge erred in holding that evidence seized as a result of a warrantless search was presumptively inadmissible under s. 24(2) and in placing an onus on the Crown to rebut this presumption. Further, the Crown suggested that the trial judge did not properly assess the evidence relating to the nature and extent of the s. 8 *Charter* breach and failed to engage in any meaningful balancing of the three s. 24(2) factors.

Onus Under s. 24(2)

In this case, the trial judge held that evidence obtained by an unauthorized search was presumptively inadmissible and that the Crown had the burden of demonstrating that the admission of such evidence would not bring the administration of justice into disrepute. This was an error and the trial judge approached the s. 24(2) issue from the wrong perspective. Instead, it is the person applying for exclusion of evidence under s. 24(2) who must satisfy the court on a balance of probabilities that the admission of the evidence could bring the administration of justice into disrepute. There is, however, a "common sense proposition that in cases involving an unreasonable search, unless the Crown can show the police had a reasonable basis for acting as they did, as a practical matter, a presumption may arise that the Charter-infringing state conduct was serious." But this does not transform the onus of proof under s. 24(2) so as to require the Crown to demonstrate that admission of evidence obtained under the search would not bring the administration of justice into disrepute. "Even if one presumes in certain circumstances that Charter-infringing state conduct is serious, that does not determine the s. 24(2) analysis," said Justice Simmons. "Rather, it remains necessary to consider the other lines of inquiry in the [s. 24(2) Charter] analytical framework, and 'to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute'."

"[T]he existence of a concurrent criminal law search purpose does not, in itself, preclude the existence of a valid regulatory search purpose – nor does it, in itself, make a search that is otherwise authorized by law unreasonable under the Charter."

Concurrent Purposes

The Court of Appeal found that the existence of a concurrent criminal law purpose did not in itself make a search that was otherwise authorized by law unreasonable under the *Charter*. Although a warrantless search shifts the onus to the Crown to establish on a balance of probabilities that the search was authorized by law, that the law was reasonable, and that the manner in which the search was carried out was reasonable, a change in focus of the investigation (eg. from a mere regulatory one to one involving criminal infractions) does not necessarily render the search unreasonable. "[T]he existence of a concurrent criminal law search purpose does not, in itself, preclude the existence of a valid regulatory search purpose – nor does it, in itself, make a search that is otherwise authorized by law unreasonable under the Charter," said Justice Simmons. "[W]hen considered as a whole, the trial judge's reasons reflect an either/or approach to assessing the evidence concerning the officers' motivations when the trailer doors were opened and fail to reflect an appreciation that the presence of the criminal law search purpose does not, of itself, preclude the presence of a valid regulatory search purpose." In this case, the enforcement officer did not require an articulable basis for invoking his authority under s. 216.1. He was entitled to conduct an inspection to confirm regulatory compliance even in the absence of reasonable and probable grounds for believing that some infraction had been committed. The trial judge was required to determine whether the officer initially formed a legitimate intention to search the tractor-trailer for regulatory purposes (whether he possessed a concurrent criminal law purpose or not) and, if he did, whether that legitimate intention was still

subsisting when he opened the trailer doors. It was not enough for the trial judge to simply determine whether the officer had a criminal law purpose - even a predominant criminal law purpose - as events progressed. Thus, the trial judge erred when assessing the officers' evidence relating to whether opening the trailer doors amounted to a s. 8 *Charter* breach. He failed to advert to the principles that the presence of a criminal law purpose does not, in itself, preclude the existence of a valid regulatory search purpose or make a search that is otherwise authorized by law unreasonable under the *Charter*.

Balancing s. 24(2) Factors

Even if the *Charter*-infringing state conduct fell at the most serious end of the spectrum, it was still necessary to balance that assessment against the assessments arising from the impact of the misconduct on the accused's *Charter*-protected rights and the fact that exclusion of the evidence would put an end to the prosecution of a very serious charge. "To the extent that the [accused] had a reasonable expectation of privacy in the trailer, his Charter-protected interest could only be described as minimal," said the Court. Commercial trucking is a highly regulated industry and truckers can expect to be subject to random inspections from time to time. Further, the accused had an extremely low level of privacy interest in the trailer. He did not own it, had no authority to determine what was loaded into it, and was not allowed to place anything in it without the owner's permission. He generally did not load goods into the trailer himself and the suppliers often secured the back of it. He did not have permission from the owner to put any items into the trailer other than the load he was supposed to deliver and there was no lock on the trailer doors. Here, the trial judge failed to engage in any meaningful balancing of the three s. 24(2) factors.

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

Complete case available at www.ontariocourts.on.ca

UNDERCOVER CELL-PLANT DID NOT BREACH s. 9

R. v. Chung, 2011 BCCA 131

The accused was arrested in Ontario on the authority of an arrest warrant issued out of Vancouver, British Columbia. He was advised of his right to instruct counsel but said "No" when asked if he wanted to call a lawyer. He was booked into cells and the Vancouver Police were advised of the arrest. Crown counsel in Vancouver later authorized the accused's return to Vancouver. While at the police station that night the accused twice more declined to call a lawyer. The next day he was taken before a Justice of the Peace (JP) in Ontario. He had been in custody for about 33 hours, a circumstance that breached s. 503(1)(a) of the *Criminal Code* which requires an appearance before a JP within 24 hours of arrest. There was no explanation for this delay, nor was there evidence that the delay was deliberate or designed to facilitate police investigation. Instead, the delay appeared to have been caused by administrative error.

The accused was remanded in custody for six days and the warrant of remand directed that he be conveyed to a named provincial corrections center or "other Provincial Correctional Facility". He was taken to a remand centre (a provincial facility) pending his transportation to Vancouver. At the request of Vancouver detectives, the York Regional Police were to conduct a cell-plant operation. Two British Columbia deputy sheriffs flew to Toronto to execute the accused's arrest warrant. A deputy sheriff advised the accused of his right to counsel and this time he said he wanted to call a lawyer. After the deputy sheriffs appeared before a JP for an endorsement of the warrant under s. 528 of the *Criminal Code,* thereby formally executing it, he was moved from the detention centre located near the airport to a police detachment some 45 kms. away so he could be lodged in a police cell in order to facilitate the undercover operation. At the detachment the accused told police he wanted to speak to duty counsel. After an attempt to get through to a Vancouver duty counsel lawyer was

unsuccessful, the accused requested a Vancouver lawyer of choice. Efforts to reach this lawyer were unsuccessful. The lawyer was not in his office and police were told he did not practice criminal law. A second effort to get in contact with a Vancouver legal aid lawyer was unsuccessful. Contact was subsequently made with an Ontario duty counsel, who the accused spoke with for 14 minutes. The accused did not express any dissatisfaction with this call. He was placed in a cell next to an undercover officer posing as a fellow prisoner and made self-incriminating statements about the British Columbia offences.

Although the British Columbia Supreme Court trial judge found the accused was not taken before a JP in compliance with s. 503 *Criminal Code* (the 24-hour time limit) and was therefore in custody longer than the maximum time permitted, the extra delay of eight hours, given the timing of the arrest in the morning hours, was not significant. "While it technically may be a breach of s. 9 rights, it is not serious enough to justify exclusion of subsequently-obtained evidence," he said. The accused also claimed that moving him 45 kms. further away from the airport and not detaining him in a provincial institution as required by the remand order also rendered his detention arbitrary. The trial judge, however, rejected this. He found that no s. 9 breach arose out of the place of detention after the arrest warrant had been executed by the deputy sheriffs. In his view, the investigative power of the police did not end until the accused had been returned to Vancouver for further remand. The judge also ruled that the accused's s. 10(b) rights were not violated. The accused spoke to Ontario duty counsel and made no complaints he was unable to speak to the lawyer of his choice. The undercover evidence was admissible, the accused was convicted, and he was sentenced to 12 years in prison.

s. 9 *Charter*: s. 503 CC Time Limit

The Court of Appeal agreed that the accused's s. 9 rights had been breached. But rather than characterizing the breach as merely technical as done by the trial judge, Justice Low, speaking for the unanimous Court of Appeal, instead said it was not serious or significant since it was of short duration and the product of administrative error. The breach had no connection with obtaining the incriminating statements and did not vitiate the Vancouver arrest warrant. The arrest warrant was properly executed by the deputy sheriffs after the accused's appearance before a JP and there was no suggestion that the JP was without jurisdiction to remand the accused or later authorize the execution of the warrant.

s. 9 *Charter*: Moving the Accused

Although some cases have made a distinction between investigative police custody and the court's jurisdiction over an accused, the Court of Appeal refused to hold that an appearance before a judicial officer always cloaks the accused in some sort of protection from proper police investigative enquiry, such as a properly conducted undercover operation. Justice Low stated:

> [H]ere there was, in my opinion, no breach of the s. 9 rights of the [accused] by reason of the fact that when the undercover operation was conducted the [accused] was in a police lockup and not in a provincial jail as directed by the remand warrant. This is because once the deputy sheriffs executed the Vancouver arrest warrant, the remand warrant no longer applied. Its purpose was to hold the [accused] in custody pending execution of the arrest warrant. The remand had run its course. Thereafter, the deputy sheriffs were entitled to arrange with the York police for a place in which to hold the [accused] in custody until it was time to go to the airport. It matters not what police lockup was used. Nor does it matter that the deputy sheriffs might not have known about the undercover operation. Their mandate was to transport, not to investigate. At the critical time, the [accused] was in lawful custody at a suitable place and his custody was not arbitrary. [para. 30]

Criminal Code s. 503 (1)(a) A peace officer who arrests a person with or without warrant ... shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with according to law: (a) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period, ...

s. 10(b) *Charter*: Right to counsel

The accused had submitted that his s. 10(b) right to counsel had been breached because the police officer who assisted him in obtaining access to counsel of his choice failed to make reasonable efforts. In his view, the police officer made a "feeble" attempt to put him in touch with his lawyer. But the Court of Appeal found no such breach:

> Mr. McGregor [the accused's lawyer] was not the accused's first choice. He initially asked to speak to duty counsel. When told that Mr. McGregor was not available and did not practise criminal law, the [accused] did not persist. He did not ask that Mr. McGregor be called later or say he would speak only to Mr. McGregor. After the [accused] had spoken to local duty counsel for a reasonable period of time, he expressed no concern about the opportunity he had been given to consult counsel. [para. 44]

And further:

> The [accused] received legal advice. There is no evidence that the advice given was not competent. The police officers acted reasonably in attempting to put the [accused] in touch with duty counsel in Vancouver and, later, with Mr. McGregor. The [accused] did speak to counsel for a reasonable period of time and expressed no dissatisfaction. There was no reason for the police officers to believe that the [accused's] rights under s. 10(b) had not been fully exercised. Nor was there any reason for the trial judge to conclude otherwise. [para. 49]

The Evidence

Since there was no connection between the minor s. 9 breach resulting from noncompliance with the 24-hour time limit and the undercover officer obtaining the incriminating evidence, the accused's statements were not subject to exclusion. If the accused had been taken before a JP within 24 hours, he would have been remanded for six days and all subsequent events would have unfolded as they did. The accused's appeal was dismissed.

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

FRESHLY BURNT MARIHUANA ODOUR & CASH PROVIDES BASIS FOR ARREST

R. v. Loewen, 2011 SCC

After stopping the accused for speeding, an officer noticed an odour of freshly burnt marijuana coming from the vehicle and saw a duffle bag on the back seat. The accused identified himself verbally by name but could not produce a driver's licence. The officer invited him to move into the police vehicle to check his identity. Before getting in, the officer patted the accused down for officer safety reasons, discovering $5,410 in cash. The accused then admitted that he misidentified himself and a new name was provided. After issuing a speeding ticket under the second name, the officer arrested the accused for possessing a controlled substance and indicated he was going to search the vehicle. The officer found 100 grams of cocaine in the vehicle and the accused then provided his real name.

At trial in the Alberta Court of Queen's Bench the Crown submitted that the large bundle of cash found on the accused implied trafficking, which suggested quantities over 30 grams, justifying an arrest under s. 495(1)(a) (on reasonable grounds), as opposed to an arrest under under s. 495(1)(b) of the *Criminal Code* (finds committing). The accused, on the other hand, contended that the officer did not see any marijuana and therefore did not "find" him committing an offence as required by s. 495(1)(b). In his view, the smell could not amount to "finding" an offence being committed because the smell of burnt marijuana did not give sufficient grounds for arrest, since burnt marijuana was at best indicative of past possession, not present possession.

The trial judge agreed with the Crown and found that the accused's arrest was lawfully made under s. 495(1)(a), which allows an officer to arrest an individual whom they believe on reasonable grounds has committed an indictable offence. "What the cash adds to the smell is an indication of buying or selling of drugs in a relatively large quantity," said the judge. Although possession of marihuana in excess of 30 grams is required to constitute an

indictable offence, the trial judge held that the officer had reasonable grounds to believe that the accused was in possession of sufficient marijuana to constitute an indictable offence, having regard to the totality of the evidence, including the smell of burnt marijuana in the car and the sum of $5,410 found in his pocket, mostly in $20 bills, which suggested involvement in the drug trade. "Based on . . . the smell, the precise nature of it and where it came from, how that smell was associated with the accused and the accused alone, and the cash on the accused's person, the officer came to the conclusion that the accused was currently in possession of marijuana, arrested him for this, and searched for evidence in a search incident to that arrest," said the judge. There were no *Charter* breaches and, even if there were, the evidence would have been admitted under s. 24(2). The admission of the real evidence would not have rendered the trial unfair, the *Charter* breach was not serious, the officer acted in good faith, and the accused had a reduced privacy interest in the vehicle. The accused was convicted of possessing a controlled substance for the purpose of trafficking.

The accused then challenged his conviction to the Alberta Court of Appeal arguing the evidence against him was obtained from an illegal search that followed an unlawful arrest. But a majority of the Court of Appeal disagreed. Both Justices Slatter and Hunt agreed that the trial judge made no error and upheld the arrest under s. 495(1)(a). Since the arrest was lawful the search that followed was proper as an incident to arrest and there were no *Charter* breaches. Further, even if there were violations of the *Charter* the evidence of the cocaine was admissible under s. 24(2). Justice Berger, however, disagreed. In his view the arrest was unlawful, the search was unrelated to the arrest, and the evidence was inadmissible under s. 24(2) of the *Charter*. The accused then appealed to the Supreme Court of Canada.

Arrest: s. 495(1)(a) of the *Criminal Code*

The unanimous Supreme Court (7:0) first noted that if the accused's arrest was unlawful, his detention violated s. 9 of the *Charter* and the search could then not have been incidental to arrest and therefore would have breached s. 8. But the Supreme Court agreed that the officer did have reasonable grounds to arrest the accused for possession of a controlled substance under s. 495(1)(a). In its view, "the evidence was sufficient to support [the trial judge's] inference that the necessary grounds for arrest existed." In holding that it was reasonable for the officer to believe he was dealing with more than 30 grams of marihuana, the trial judge considered not only the smell but also the large amount of cash found in the accused's pocket. In the Supreme Court's view, the evidence supported the trial judge's conclusions, the arrest under s. 495(1)(a) was lawful, and it did not violate the *Charter's* protections against wrongful detention.

Search Incident to Arrest

Since the arrest was lawful, the Supreme Court upheld the trial judge's conclusion that the search was properly conducted incidental to arrest and did not violate s. 8.

Section 24(2) *Charter*

Although it was unnecessary to consider s. 24(2) since there was no *Charter* violations, the Supreme Court would have nonetheless agreed with the trial judge that the evidence was admissible. She considered and weighed the relevant factors in the 24(2) analysis. The accused's appeal was dismissed.

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

Editor's note: More detailed facts of this case were taken from the Alberta Court of Appeal judgement *R. v. Loewen*, 2010 ABCA 255.

BY THE BOOK:

Power of Arrest: *Criminal Code*

s. 495(1)(a) A peace officer may arrest without warrant (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence ...

REASONABLE SUSPICION REQUIRES OBJECTIVE FACTS

R. v. Savage, 2011 SKCA 65

At about 4:30 pm police in Saskatchewan stopped the accused for speeding. The officers were performing traffic duties and had a drug sniffing dog with them. The interior of the truck was somewhat cluttered with food wrappers, drink bottles and maps, there was a very strong, almost overpowering, odour of air freshener emitting from the vehicle, and both windows were down. The accused was extremely nervous. His hands were shaking, he was trembling and breathing rapidly, his carotid artery was visibly pulsating, and his voice was cracking. The vehicle and the accused were from Ontario and he said he was employed part-time in Alberta and was travelling back and forth for that purpose. Police thought this explanation for travel was a bit odd, as it involved long distance travel for part-time work. Although they had noted a number of "flags" that alerted them to the possibility that the accused might be transporting contraband, the officers did not yet believe they had grounds to detain the accused for further investigation. These flags were:

- his extreme nervousness;
- the cluttered appearance of the truck's interior;
- the somewhat odd explanation of why he was travelling;
- the very strong smell of air freshener and the open passenger side window, suggesting it could be used to mask the smell of contraband; and
- the fact that he was travelling west to east, with the destination of a large urban centre.

A computer check revealed that the accused had a criminal record, including a conviction about 18 years before for trafficking in drugs. At this point an officer opined that he now had sufficient grounds to detain. This criminal record, in his view, was the tipping point so that the accumulation of suspicious factors gave rise to a reasonable suspicion that the accused might be transporting drugs. The drug dog was then deployed and a positive hit at the rear of the vehicle was made. The accused was arrested and the truck was searched as an incident to arrest. Four pounds of marijuana divided in eight half pound bags were found, rolled up in a sleeping bag and tucked in the box of the truck. The accused was charged with possession of marijuana for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*.

A Saskatchewan Provincial Court judge determined that the factors relied upon by the officers did not support a reasonable suspicion to detain the accused nor deploy the sniffer dog. She noted the absence of positive indications of drug possession, such as a smell of marijuana or the presence of drug paraphernalia, and that the accused was not driving a vehicle owned by a third party. Each individual factor, relied upon by the officers, when taken alone was innocuous. "[T]he police officer did not have a reasonable suspicion that the accused was guilty of an on-going criminal offence," she said. "A hunch is not good enough, even though in hindsight, the police were right. In this case, all of the relevant evidence, considered collectively, does not satisfy the reasonable suspicion test of criminal activity." Since the grounds for the arrest arose from the sniffer dog hit, the arrest was unlawful, the physical search of the vehicle unreasonable, and the evidence was excluded under s. 24(2). The accused was acquitted.

On appeal by Crown the Saskatchewan Court of Appeal found the trial judge imposed an unduly high standard in evaluating the facts relied upon by the investigating officers to justify a reasonable suspicion that the accused might be transporting illegal drugs. She confounded the threshold of reasonable suspicion with that of reasonable and probable grounds:

> Although neither requires proof beyond a reasonable doubt, there is a significant distinction between the test of objectively reasonable and probable grounds to believe that a crime has been committed and the test of objectively reasonable suspicion that a crime is being or has been committed. The former requires that the factors relied upon have enough probative value to establish the probability that the suspect is implicated in criminal activity. This is the threshold required

> for a lawful arrest and a physical search incident to arrest. The standard for reasonable suspicion, the threshold for investigative detention and for the deployment of a sniffer dog, is less stringent. This requires that the police have more than a mere hunch, based on intuition gained by experience. They must be able to point to objective facts that support the suspicion. However, the lower standard does not require that the officers be able to point to factors sufficient to establish the probability of the crime. Reasonable suspicion is a lower standard and can be established by less evidence, with less probative value, than reasonable and probable cause. [para. 18]

"Reasonable suspicion is a lower standard and can be established by less evidence, with less probative value, than reasonable and probable cause."

Although a "positive indication" of drug possession, such as the presence of an odour of marihuana or drug paraphernalia in plain view, could well provide reasonable grounds for an arrest their absence is not determinative in relation to the test for reasonable suspicion. Moreover, "the trial judge erred in failing to assess or to appreciate the probative value, or the relevance, of the factors cited by the officers as grounding their suspicion," said Justice Smith, authoring the Court's opinion. "The test is not whether there might be an innocent explanation. It is whether the presence of such a fact enhances or makes more likely the possibility of the crime at issue. In my respectful view, each of the factors relied upon by the officers was objectively relevant to and logically probative of their ultimate suspicion." The Court of Appeal then went on to view the factors cited by police:

- ***the strong and almost over powering smell of air freshener.*** "While this is by no means inconsistent with innocent activity, and is therefore far from conclusive, the officers were able to point to their experience that air freshener is often used by those transporting drugs to mask the smell of the contraband. Thus, the presence of this factor makes it more likely, than would its absence, that contraband is present. More than that, however, an innocent use of a very strong masking agent, while possible, is improbable. It is, in fact, an unusual circumstance that distinguishes the truck of the [accused] from the vast majority of trucks traveling at the same time on the same highway. Accordingly, the probative value of this factor is of some considerable significance. It is not 'innocuous'."

- ***the untidy appearance of the interior of the vehicle.*** This "is less probative, because less unusual, but it is not devoid of probative value. Again, the officers were able to point to their experience that the vehicles of those transporting drugs over a long distance often have a 'lived in' look, with evidence of eating and often sleeping in the vehicle. This is because drug couriers generally do not wish to stop for meals or hotels and leave the vehicle unattended. At the same time, of course, many travelers eat in their car and are untidy. Nonetheless, this factor is not entirely 'innocuous'."

- ***nervousness.*** "[M]any people not guilty of criminal activity might exhibit signs of nervousness when stopped by the police, even for minor traffic violations, and some might show signs of extreme nervousness. Nonetheless, nervousness beyond what the police would normally expect, while far from conclusive, is not an irrelevant or completely innocuous factor. It has probative value making more likely the possibility of criminal activity."

- ***the travelling direction, destination, and travel explanation of the occupants.*** "[T]he fact that a vehicle is traveling from west to east has very weak probative value. Probably half the vehicles on the road are traveling in this direction. Nonetheless, it is not entirely devoid of relevance, since this is, in the officers' experience, the normal direction for drug traffic. That the travel destination is an urban centre demands a similar analysis. Its probative value is very weak, but not non-existent, since drugs are more likely to be destined to a large urban centre where drug use would be higher

than in a small centre or rural area. Finally, whether an explanation of the reasons for the travel or the itinerary is odd, inconsistent or unusual is often a matter of debate, but it does require some analysis by the trial judge, because it can be an indication that it is an invented story to cover a more nefarious purpose for the trip. These factors are often of limited significance, considered alone, but may nonetheless be of some relevance when taken together with other factors considered."

- ***criminal record.*** "A criminal record of a previous conviction for drug trafficking, even a record 18 years old, clearly has some probative value, making the possibility that the [accused] is carrying drugs more likely than it would be had he no record at all in this regard. That it is far from conclusive does not make it innocuous."

> "[The standard for reasonable suspicion] requires that the police have more than a mere hunch, based on intuition gained by experience. They must be able to point to objective facts that support the suspicion. However, the lower standard does not require that the officers be able to point to factors sufficient to establish the probability of the crime."

Here, the trial judge failed to give any consideration to the probative value of the facts relied upon by the officers under the mistaken view that if they were susceptible to an innocent explanation they could be accorded no weight. She also failed to give appropriate consideration to the probative value of the factors when considered collectively:

> The point of considering the factors collectively is that, to pass the threshold for reasonable suspicion, no one factor is likely to have compelling probative value, and the value of some may be very weak, having significance at all only when considered together with other factors. In addition, while a generalized suspicion of something wrong cannot justify a search using a sniffer dog, some of these factors may operate to focus the suspicion on a particular criminal activity. …
>
> To establish the threshold for reasonable suspicion the police needed only to point to objectively discernible facts which support a reasonable suspicion that the [accused] was transporting drugs. In this case, on a proper consideration of the relevance and probative value of the factors relied upon by the police, it is my view that that threshold was clearly crossed. Of particular significance, and of strongest probative value, were the use of an odour masking agent and the [accused's] criminal record, for these both served to distinguish him sharply from the average traveler and to relate his nervousness to the particular activity of transporting illegal drugs. The [accused's] nervousness, insofar as it was unusual was also relevant to heighten suspicion. The untidy interior of the vehicle and the travel destination and explanation for travel were in this particular case significantly less probative, but nonetheless relevant factors in the overall constellation of factors considered by the police officers. [paras. 29-30]

The investigative detention of the accused and the deployment of the sniffer dog did not violate the *Charter* and, following the positive hit by the sniffer dog, the arrest was based on reasonable grounds to believe that he was transporting illegal drugs. The search of the vehicle that uncovered the marijuana was a lawful search incident to arrest. The Crown's appeal was allowed, the accused's acquittal set aside, and a new trial was ordered.

Complete case available at www.canlii.org

JIBC announces two new Graduate Certificates in Tactical Criminal Analysis and Intelligence Analysis.
see page 36

REASONABLE SUSPICION NEAR BOTTOM END OF CONTINUUM

R. v. Mackenzie, 2011 SKCA 64

After making a u-turn police caught up with the accused two kilometers down the highway to warn him about speeding. He pulled his vehicle over to the side of the road despite not receiving any direction to do so. Without apparent prompting the accused said he was "sorry" and that he knew he had been speeding. The officer confirmed speeding as the reason for the stop and asked for the accused's driver's licence and vehicle registration, which were provided. His hands were shaky and trembling, he was sweating, breathing very rapidly, his carotid artery was pulsing very rapidly, and his eyes had a pinkish colour to them. When asked if he was alright the accused pointed down to some asthma medication on the console of the vehicle, said he had asthma, and requested to take some. After the accused took the medication the officer could not see any noticeable decrease in his breathing or other observations. When asked, the accused said he was coming from Calgary and going to Regina, his home. He seemed to be somewhat confused on when he had traveled to Calgary. Even though a computer check came back negative, the officer suspected that the accused was involved in a *Controlled Drugs and Substances Act* (*CDSA*) offence based on his observations and experience, which included a standardized field sobriety-testing (SFST) course, Pipeline and Advanced Pipeline training, and over 5,000 traffic stops involving 150 discoveries of drugs. The accused was asked to step out of the vehicle, advised he was going to be detained for further investigation under the *CDSA*, and was told of his *Charter* rights. A drug sniffing dog was deployed and conducted a sniff-search around the exterior of the vehicle. The dog indicated on the back hatch area and the accused was arrested. He was again given his rights. The vehicle was then physically searched and 31.5 pounds of marijuana in three gift-wrapped packages was found in the rear hatch area. The accused was charged with possessing marihuana for the purpose of trafficking.

A Saskatchewan Court of Queen's Bench judge properly identified a "reasonable suspicion" as the standard for conducting a sniff-search using a drug dog. However, the accused's very high level of nervousness, his pinkish eyes, which in the police officer's opinion was consistent with the use of marihuana, and the course of travel from Calgary (a source of drugs) to Regina (a known destination of sale), did not meet this standard. "There appeared to be no other signs that indicated the presence of illegal drugs such as plain sight or smell," said the judge. "At best he was acting on a hunch." The judge opined that it was "quite conceivable that the observations of the accused claimed to have been noticed by [the officer] were enhanced after the drugs were located." The sniff-search was unreasonable and breached s. 8 of the *Charter* (unreasonable search and seizure). The marihuana was excluded under s. 24(2) and, without the marijuana as evidence, there was no case and the accused was acquitted. The Crown then appealed to the Saskatchewan Court of Appeal.

Controlling Standard

Although the use of a sniffer-dog as an investigative technique constitutes a search under s. 8 of the *Charter*, police officers can conduct sniff-searches without prior judicial authorization on a "reasonable suspicion" standard. "A peace officer may deploy a sniffer-dog to search a vehicle where that officer has reasonable grounds to suspect that the presence of a "controlled substance", within the meaning of the [CDSA]," said Justice Caldwell for the unanimous Court. "The standard of "reasonable suspicion" is less demanding than that of "reasonable and probable grounds"; however, there is no comprehensive set of evolved criteria which control whether the standard has been met. Each case turns on its own facts." The Court continued:

> "The standard of 'reasonable suspicion' is near the bottom end on the continuum of probability (with proof 'beyond a reasonable doubt' at the other)."

> The assessment of the reasonableness of a sniff-search requires a thorough understanding of the standard to be

> met and of the circumstances leading to the search. The standard of "reasonable suspicion" is near the bottom end on the continuum of probability (with proof "beyond a reasonable doubt" at the other). In any case, the court must undertake a subjective and objective analysis of whether the state has met its burden. For a sniff-search, this analysis would have the court ask:
>
> (a) Did the peace officer subjectively believe that there were reasonable grounds to suspect the accused was in possession of a controlled substance?
>
> (b) Were there sufficient objective grounds to reasonably suspect the accused was in possession of a controlled substance? [at para. 19]

Was the Standard Met?

In this case, the Court of Appeal accepted that the trial judge concluded the officer believed he had proper grounds to deploy the sniffer-dog (subjective analysis). As for the sufficiency of the objective grounds to support a reasonable suspicion that the accused was in possession of a controlled substance, the Crown argued, in part, that the trial judge applied a too demanding standard.

In deciding whether a suspicion is reasonable a "judge must examine the factual circumstances leading to the sniff-search and whether, considered with an appreciation of the peace officer's training and experience, those circumstances could have reasonably given rise to a suspicion of possession of a controlled substance," said Justice Caldwell. The scrutiny of warrantless searches, done after the fact, must be rigorous. However, the analysis of a reasonable suspicion does not involve a search for motive. It is also important that a trial judge take into consideration the experience and training of the officer when determining the objective existence of a standard of probability like reasonable suspicion or reasonable and probable grounds. Experience and training must also be carefully assessed in the context of the standard of reasonable suspicion.

In this case, the officer had more than a hunch. He carefully articulated the factors which led him to form a suspicion that the accused was involved in criminal activity and why he believed that that criminal activity was possessing a controlled substance:

- His erratic driving and overreaction to police presence in slowing to 20 km/h below the speed limit and pulling over before the police signaled him to do so. This was behaviour from which the officer's experience had taught him to infer that the accused might be hiding something from the police;
- His extremely high level of nervousness, which was "probably some of the highest nervousness that [he'd] seen in a traffic stop." In addition, when the accused was told of the relatively minor reason for the stop, his level of nervousness did not diminish. This was behaviour which, in the officer's experience, further indicated the accused had something to hide;
- His hands were shaky and trembling when handing his driver's licence and registration over. This was indicia of nervousness and, in the officer's training, a symptom of marijuana use;
- He was sweating with beads of sweat forming on his forehead. This was indicia of excessive nervousness;
- He was breathing very rapidly, his chest was moving in and out very quickly, and this rapid breathing was audible when speaking. This was indicia of excessive nervousness;
- His carotid artery was pulsing very rapidly. This was a sign of a high level of nervousness and something the officer had experienced in traffic stops "where criminality was involved";
- The accused's nervousness was significant enough to prompt the officer to inquire about his health, but his rate of breathing and other indicia of nervousness did not noticeably decrease after he took his asthma medication. (i.e. absence of a discernible reason for symptoms of nervousness);
- His eyes had a pinkish colour to them. This was a symptom known to the officer by training and experience to be associated with marijuana use;
- He seemed confused as to his travel itinerary. This was something that the officer had observed in individuals who were trying to avoid detection of a crime by hastily making up

a story but then forgetting the details of the story;

- He was travelling from Calgary (a city known to the officer as a distribution point for drugs) to Regina (a city known to the officer as a destination point for drugs) along the Trans Canada Highway (a route known to the officer as being used by drug couriers);
- He was on a quick turnaround trip. In the officer's experience, drug couriers make quick turnaround trips; and
- Neither the Canadian Police Information Centre (CPIC) database nor the Police Information Retrieval System (PIRS) database contained any record of the accused. There was no discernible reason for the extreme degree of nervousness exhibited.

All of these factors "synergistically" caused the officer to suspect the presence of a controlled substance. But the trial judge simply reduced these factors to only three (i.e., "very high level of nervousness", "pinkish hue of the driver's eyes", and "course of travel"). The latter two were then characterized as an "opinion" that was unsupported by evidence and the inferences drawn by the officer were discounted. In doing so, "the judge failed to appreciate the constable's issue-specific knowledge, training and experience and thereby ignored the probative value of the constable's evidence as informed opinion," said the Court of Appeal. "The constable's testimony about the factors that led him to draw the overall inference that drugs might be present in [the accused's] vehicle must be seen and weighed not in terms of unsubstantiated opinion, but with an appreciation of [the officer's] training and experience." Nervousness, a natural human condition observable, describable and appreciable (or objectively verifiable), by anyone, required an interpretation by the officer. Here, the accused was "extremely nervous", probably some of the highest nervousness the officer had ever seen in a traffic stop:

> As a factor unto itself, nervousness alone might not ground a reasonable suspicion of criminal activity; but, here, the constable grounded his suspicion on more than the existence of nervousness. [The officer] also testified to [the accused's] erratic driving (an overreaction to police presence), to the extreme degree of [his] nervousness, to the absence of abatement in the degree of nervousness given the relatively insignificant reason for the traffic stop, and to the absence of any apparent reason for such a high degree of nervousness. In this sense, [the officer] drew upon his experience and training to contextualize [the accused's] nervousness, which lent a tenor to that nervousness; one with the shade of potential criminal wrongdoing on the part of [the accused].

Furthermore, the constable said his experience and training suggested that an individual with a "pinkish" eye colour might have recently consumed marijuana. On cross-examination, the constable testified that while use of marijuana does not necessarily mean an individual is transporting marijuana, in his experience, "people that use marihuana usually have marihuana." Logically, however, not everyone who exhibits pinkish eye colour has recently used marijuana, let alone is in the process of transporting drugs, and the constable did not suggest otherwise; nor is it likely that everyone who has recently used marijuana is in possession of it. But, when the standard is reasonable suspicion, the law does not require hard certainty as to the inferences drawn by a peace officer. Even where equally or even more persuasive inferences may be drawn from the observations, a judge may find that the peace officer's inferences, when considered with an appreciation of the officer's training and experience, are reasonably supported by the factors articulated. A trial judge should be reluctant to discard such inferences as wrongly drawn without some analysis of why they were not appropriate.

In this case, it was also reasonable to place all of the constable's observations and inferences within the context of his knowledge that drug couriers use the TransCanada Highway for quick turnaround trips when transporting drugs from Calgary to Regina. While the circumstances might not have suggested the presence of drugs to someone not having [the officer's] training and experience, and while there may be other plausible and innocent explanations for the pinkish eyes and trembling hands observed by the constable, those factors support a suspicion

of potential criminal wrongdoing and, more importantly, wrongdoing involving drugs. [paras. 34-36]

Although close to the line, the constellation of objective factors in this case were enough for the officer to reasonably suspect that the accused unlawfully possessed a controlled substance. The reasonable suspicion standard was satisfied. The warrantless sniffer-dog search of the vehicle's exterior was reasonable. Since the sniff-search was reasonable, then the subsequent physical search pursuant to the accused's arrest was permitted and the marijuana was admissible. The Crown's appeal was allowed and a new trial was ordered.

Complete case available at www.canlii.org

OFFICER SAFETY ALERT CAN FORM PART OF GROUNDS

R. v. Plummer, 2011 ONCA 350

The accused met his girlfriend who had parked her car in the fire lane beside his apartment. He brought his girlfriend's overnight bag with him, which she had left at his home the night before, and sat in the passenger seat of the car which was registered to his girlfriend's mother. Two police officer's saw the car parked facing the wrong way in a clearly marked no-parking zone and they knew that the door of the apartment building closest to the car was used for drug buys. As they passed by the car the police officers saw an expression of surprise or shock on the accused's face and they saw him move downward in his seat, bending forward and slouching down. Police thought that his movements were consistent with concealing drugs. The officers made a u-turn and came back to investigate the car and its occupants. They asked the occupants for their names and they immediately associated the accused's name with an officer safety alert that had circulated a week before. It described the accused as possibly armed with a handgun and in possession of a bulletproof vest. Believing there were grounds to search the accused because of the alert, his reaction to seeing the police, and his apparent attempt to hide something, police asked him to exit the vehicle. During a pat-down an officer felt the bulletproof vest. Police then proceeded to the car with a view to searching it to determine if there was a gun. They first checked under the passenger's seat and, when the bag was searched, the accused fled.

At trial in the Ontario Superior Court of Justice the judge concluded the accused's detention was lawful. The alert, the accused's reaction to seeing the police, and his suspicious conduct in the car as if he was concealing something provided a "constellation of factors" for the officers to embark on an investigative detention. The pat-down search was also lawful. The officer was honestly concerned for the safety of the people in the vicinity and the police. This concern was also objectively reasonable. Once the bulletproof vest was found the level of suspicion was raised to entitle a search of the area in the car where the police had seen the accused acting suspiciously as if he was concealing something. "[W]here the police see conduct consistent with concealing something in the area of the front passenger seat, have information the person may be carrying a gun and wearing a bullet proof vest, and confirm he is wearing a bullet proof vest, to find that the police had to stop their search once they found he was not carrying a gun on him, flies in the face of concerns

The Officer Safety Alert

*** POSSIBLY ARMED WITH A HANDGUN ***

ON 26 AUGUST 2006, UNIFORM PERSONNEL RECEIVED INFORMATION FROM A CONFIDENTIAL INFORMANT REGARDING ANDREW "BUBBA" PLUMMER. PLUMMER IS THE BROTHER OF ANDREW LAWRENCE – 1985-11-19 – THE INTENDED TARGET OF A SHOOTING ON ORENDA COURT ON 3 AUGUST 2006.
INFORMATION RECEIVED IS THAT PLUMMER IS ACTIVELY ATTEMPTING TO AVENGE THE SHOOTING AND THAT HE IS IN POSSESSION OF A HANDGUN WHICH HE CARRIES IN HIS WAISTBAND. INFORMATION HAS ALSO BEEN RECEIVED THAT PLUMMER IS ALSO IN POSSESSION OF A BULLETPROOF VEST.
ANY OFFICER DEALING WITH ANDREW PLUMMER SHOULD USE CAUTION AS HE IS PRESUMED TO BE ARMED AND DANGEROUS.

for officer safety," said the judge. And even if the police breached ss. 8 and 9 of the *Charter* the gun would nonetheless be admissible under s. 24(2). The accused was convicted of possessing a prohibited weapon, possessing a firearm in a motor vehicle, possessing a firearm contrary to a prohibition order, and other related offences. He was sentenced to 16 months in jail in addition to the 16 months of pre-trial custody. The accused then appealed arguing the detention was unlawful, the search of the bag inside the car was unreasonable, and the gun should have been excluded as evidence.

The Detention

All three Ontario Court of Appeal justices agreed that the detention in this case was lawful. "The threshold of reasonable grounds for an investigative detention must be determined through an examination of the totality of the circumstances," said Justice MacPherson. As part of this analysis a court can properly consider an accused's body language and movements such as their reaction to seeing the police and movements that are consistent with attempting to conceal something. "There is abundant authority for observations of reactions by suspects to police presence permissibly forming part of the constellation of factors that may determine the legality of an investigative detention. The value of such evidence, if any, will inevitably be determined by its intersection with the myriad of other circumstances in play." The Officer Safety Alert could also form part of the factors amongst the totality of the circumstances. "Although the information in the alert was stated to have come from a confidential informant (I regard this as a neutral, not a negative, factor), the trial judge properly focused on several features of the alert to find it deserving of weight in the reasonable suspicion calculus: the alert provided recent information, it provided considerable detail about the suspect, and it provided information of motive," said Justice MacPherson. Here, as found by the trial judge, the police did have reasonable grounds to conduct an investigative detention.

"The threshold of reasonable grounds for an investigative detention must be determined through an examination of the totality of the circumstances it."

The Search: Standing?

All three justices also agreed that the accused had no standing to allege that the search of his girlfriend's bag violated his s. 8 *Charter* rights because he had no reasonable expectation of privacy in the thing searched (his girlfriend's bag) nor in the thing seized (the gun). First, the accused was not the owner of the car – it was his girlfriend's mother's. Nor was he the driver. "He was not even a passenger in the car," said Justice MacPherson. "He was simply sitting in the front passenger seat with the door open and his feet dangling outside." Second, the accused did not have a privacy interest in the bag. It was his girlfriend's and contained only her personal effects. The accused's "connection to it was simply carrying it from his apartment to her car when she came to retrieve it." As for the gun, although it belonged to him, he abandoned it. "What the accused did in this case amounts to a form of double abandonment," said Justice MacPherson. "First, he removed the gun from his person and hid it in his girlfriend's bag. Second, he then ran away from the scene. Taken together, the [accused] first distanced himself from the gun, by placing it in the bag, and then distanced himself from the bag by running away. In these circumstances, his potential privacy interest in the gun evaporated."

The Search: How Far?

Although the accused did not having standing to challenge the search of the bag, the Court nevertheless considered the "difficult and contentious issue of whether the limited power to conduct a pat-down search to ensure officer safety should be extended to permit the search of bags and vehicles." Even if the accused had standing, all three justices found that the search would not have violated s. 8 of the *Charter*, albeit through different approaches. Justices Sharpe and Laskin stated:

> A search incidental to an investigative detention is defined and limited by the immediate concerns of officer safety. This reflects an important difference between the narrowly focussed and strictly limited protective search

> that may accompany an investigative detention, and the broader power to search consequent to a lawful arrest. It is necessary to maintain that distinction and to confine the scope of a search incidental to an investigative detention within strict limits. Here, the police did not arrest the [accused], presumably because they did not think they had grounds for an arrest. As the [accused] points out, there is an understandable tendency to expand a narrow rule to endorse the police conduct being challenged, since the case before the court will always be one where the search actually yielded a weapon or some other valuable evidence. This is a tendency that the courts should resist.
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> However, on the facts as found by the trial judge, I agree that a modest extension of the Mann pat-down search was justified in this case. Although the officers had the [accused] under their temporary control, the situation was fluid. The [accused's] earlier actions, when he appeared to conceal something in the vehicle, combined with the Officer Safety Alert indicating that he might be carrying a gun, gave rise to a legitimate serious concern that he had immediate access to a weapon that he could use if the officers were to simply release him and return to their own vehicle.
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> On those specific facts, I agree that the officers were entitled to search the bag in the car as an incident of the investigative detention to ensure their own immediate safety. While this does represent a modest extension of the protective pat-down search in R. v. Mann, it is limited by the concern for immediate officer safety that underpins Mann.
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> However, I would emphasize that this should not be read as giving the police carte blanche power to permit searches of bags or vehicles incident to investigative detention. Such a search demands satisfactory proof of a serious concern for officer safety that requires something more than the initial pat-down. [paras. 76-79]

Justice MacPherson, in his reasons, noted that "where a police officer has reasonable grounds to believe that his or her safety or the safety of others is at risk, the officer may engage in a protective pat-down search of the detained individual." This power of protective search incidental to an investigative detention is a limited common law power and will only be justified if it is "reasonably necessary, reasonably executed, and based on a reasonable belief by the police that officer safety or the safety of others is at risk in the totality of the circumstances." Although the search is anchored in safety concerns and is limited to weapons, Justice MacPherson held there was nothing confining a search incidental to an investigative detention to only the person detained and could still comply with the common law and pass constitutional muster even if it went beyond a pat down. He rejected the accused's bright line test that when a pat-down search of the person reveals no weapon, the detainee must be allowed to leave unencumbered by any other search. This, in his view, would shift the focus from balancing the right to be free from unreasonable searches with legitimate safety concerns, to the location of the search. A legitimate police safety search is permissible on the basis of a valid protective purpose, not by whether the search is of the person, or of a particular place or object in the vicinity. Finally, Justice MacPherson also disagreed with the contention that when the car was searched there was no immediate risk to officer or public safety. Even though the police had the accused within their control and had found no weapon on his person, they had seen him apparently conceal something in the car and found that he was wearing a bulletproof vest. They still had an honest concern that he had immediate access to a weapon that was a threat to their safety and the safety of people in the vicinity. It was a high crime area, there had been recent shootings in the area, and there were children walking through the complex:

> Against this backdrop, I do not see why, once [the officer] discovered the bulletproof vest, he should be required to reject a further search for the gun in the immediate vicinity, including the passenger side area of the car in which the [accused] had been seated moments before. To expect the police officer to abandon his search, release the [accused] and, in effect, turn his back on the [accused] as he walks back to the police cruiser is, in my view, both unrealistic and unreasonable. [para. 65]

The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

WARRANTLESS ARREST REQUIRES SUBJECTIVE BELIEF, OBJECTIVELY JUSTIFIED

R. v. Burke, 2011 NBCA 51

Three previously proven reliable confidential informers, who provided information independent from each other, told police that the accused received orders for cocaine by cell phone and delivered the drugs from his home using either a white minivan or a black pickup truck. They related having either personally observed or participated in the illegal drug transactions. The first informer said the accused was delivering pre-packaged cocaine and Dilaudid in either a white minivan or a black pickup truck. A few days later, the informer said he saw the accused delivering cocaine in his pickup on the north side of the city. Later, the informer reported having seen the accused with cocaine and Dilaudid in his white van and selling a quantity of cocaine and Dilaudid again from it. A second informer provided information on eight occasions. He said that several times he had arranged for the accused to deliver cocaine and Dilaudid to him. He called a particular telephone number and the accused would then deliver the drugs. The police were able to verify the phone number as belonging to the accused. On two occasions the accused had delivered cocaine to the informant in a white minivan. A third informer said that within the past month he had bought cocaine or Dilaudid on at least a dozen occasions from the accused, who would use a white minivan or a black truck for deliveries. The phone number used to order drugs was the same number that had been reported by the second informer. The informer had sold and delivered cocaine within the past 24 hours and Dilaudid within the last 48 hours using a white minivan. All of the information was passed on to the investigator who believed he had reasonable grounds to make an arrest and placed the accused under surveillance. The officer followed him as he proceeded in his white minivan to a Tim Hortons parking lot and parked next to another vehicle, which was backed into a parking space. The two drivers appeared to be talking and after only one to two minutes, the two vehicles left the parking lot without anyone exiting either vehicle.

> "Trafficking in cocaine and Dilaudid or possessing these drugs for the purpose of trafficking are indictable offences. It is not necessary for the officer to either find the person in the process of committing the offence or to have witnessed the commission of it."

The accused was stopped in the minivan he was driving and arrested for possessing controlled substances for the purpose of trafficking. He was patted down, searched, and $210 was seized from his coat pocket. He was advised of his right to consult counsel and initially stated he wanted to call his lawyer. After arriving at the police station, however, he was unable to contact his own lawyer and declined the opportunity to call another one. When told he was going to be strip searched he handed over two plastic bags, one containing 10.94 grams of cocaine packaged into 14 individual packets and the other containing 20 Dilaudid pills. In the minivan police found, among other things, a cell phone with the same number reported by the informers and a wallet containing four $20 bills. He was charged with two counts of possessing a controlled substance for the purpose of trafficking (cocaine and Hydromorphone (Dilaudid)) and possessing proceeds of crime.

At trial in the New Brunswick Provincial Court the accused alleged his arrest was unlawful (s. 9 *Charter* breach) and the search unreasonable (s. 8 *Charter* breach). The trial judge agreed and excluded the evidence obtained from the searches of his person and his vehicle. Although he found the arresting officer had the required subjective reasonable grounds, the objective component was deficient. There was much information about the accused's activities over a series of months, but it was not objectively demonstrated that there were reasonable grounds "that [the accused] would have drugs in his possession for the purpose of trafficking on that day at that time". The trial judge felt more confirmation

for present possession was required. The accused was acquitted. The Crown appealed, arguing, in part, that the trial judge erred by failing to correctly apply the proper legal test in determining whether there were reasonable and probable grounds for the warrantless arrest

The powers of arrest for police are found in s. 495(1) of the *Criminal Code*. "As is evident from the language of s. 495(1)(a), an officer may arrest a person who, on reasonable grounds, the officer believes has committed an indictable offence," said Justice Richard for the New Brunswick Court of Appeal. "Trafficking in cocaine and Dilaudid or possessing these drugs for the purpose of trafficking are indictable offences. It is not necessary for the officer to either find the person in the process of committing the offence or to have witnessed the commission of it. The law is well established that, for a warrantless arrest to be valid, the arresting officer must subjectively have reasonable grounds on which to base the arrest and those grounds must, in addition, be justifiable from an objective point of view. In other words, a reasonable person placed in the position of the officer must be able to conclude there were indeed grounds for the arrest." Although Justice Richard concluded that the trial judge identified the correct "totality of the circumstances" legal test, he found it was not applied correctly.

> In the present case, the judge focused almost exclusively on the absence of independent evidence corroborating the information the informers had provided. In my respectful view, he elevated that circumstance to an essential prerequisite because he was focused not on whether there were reasonable grounds for the officer's belief that [the accused] had committed an indictable offence, but rather on the question whether there were grounds to believe [the accused] would be in possession of drugs at the time of his arrest.
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> The trial judge held that there was nothing more than suspicion for the officer's belief that [the accused] "would have drugs in his possession for the purpose of trafficking on that day at that time", that is the date and time of the arrest. With respect, this is not the proper basis upon which the officer's belief ought to have been assessed. The proper question is whether there was an objective basis for the officer's belief that [the accused] had committed an indictable offence. If so, the officer was lawfully empowered to arrest him.
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> Had the judge asked himself the right question, he would have had to determine whether the reliability of any of the tips was satisfactorily established to provide the requisite grounds to arrest on the basis of the officer's subjective belief [the accused] had committed an indictable offence. In making this determination, the judge was required to consider all the circumstances, including the following ... :
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> 1. Members of the Fredericton Police Drug Squad had been for some months gathering evidence about [the accused's] activities;
> 2. All three of the informers who provided information to the officers had proven reliable on many occasions;
> 3. All three of the informers had personal knowledge of the drug transactions in which [the accused] was involved, with two of them having themselves participated in the transactions;
> 4. The informers provided significant detail regarding the transactions, i.e. the types of drugs involved, the fact that the cocaine was pre-

BY THE BOOK:

Power of Arrest: ***Criminal Code***

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

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

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

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

packaged, the method of communication used, the phone number (found to belong to [the accused]), the vehicles he used, and the part of the city in which the transactions took place (this detail corroborated the informers reports that they were closely acquainted with [the accused]);

5. There was no evidence of an improper motive underlying the reports of the informers; and

6. There was no fact-based, as opposed to speculative, justification for the conclusion that the allegations of criminal conduct were unreliable.

In my respectful view, despite the judge's finding that the activity witnessed in the Tim Hortons parking lot was insufficient to corroborate the tips (a finding upon which I am not required to comment), there was nevertheless more than sufficient objective support for the officer's belief that [the accused] had committed an indictable offence. The police had been told by three reliable sources who had personally witnessed multiple transactions that [the accused] had been trafficking in drugs. These informers, independent of one another, provided the police with sufficient detail regarding these transactions to guarantee the trustworthiness of each informer's disclosure, especially where the detail provided by one source was corroborated by the details provided by one or both of the other sources. Had the judge weighed all the circumstances, as he was required to do, and not elevated one to an almost prerequisite, he would necessarily have concluded there were sufficient indicia of the informers' reliability so as to justify an arrest solely on the basis of the information provided. [paras. 19-22]

The trial judge erred in finding the arrest unlawful. Since the arrest was not unlawful, the detention was not arbitrary and the searches incident to the arrest were not unreasonable. The appeal was allowed, the acquittal was set aside, and a new trial was ordered.

Complete case available at www.canlii.org

STATUTORILY COMPELLED STATEMENTS INADMISSIBLE FOR ESTABLISHING REASONABLE GROUNDS

R. v. Soules, 2011 ONCA 429

Following a multi-vehicle collision, a police officer investigating the incident spoke to each driver, asking them what happened. In response, the accused identified himself as a driver. Because of his observations the officer suspected that the accused had alcohol in his system and made an approved screening device demand. The accused failed, was arrested for operating a motor vehicle with more than 80 mg%, and was advised of his right to counsel. He was transported to the police station where he subsequently provided two samples of his breath into an approved instrument (143 mg% and 136 mg%). The accused was charged with over 80 mg%.

At trial in the Ontario Court of Justice the accused was acquitted. The trial judge found his *Charter* rights were violated under s. 7, which protects a person against self-incrimination, because his statement that he was the driver was compelled under Ontario's *Highway Traffic Act*. The trial judge concluded that the accused remained at the scene of the collision and answered the officer's questions because he understood that he was required by law to do so. The breath results were excluded under s. 24 of the *Charter* because, without the accused's statement, there was no reasonable suspicion for the approved screening device demand. An appeal by Crown was dismissed by the Ontario Superior Court of Justice. The s. 7 *Charter* violation was upheld as was the exclusion of the breath results under s. 24. The Crown further challenged the acquittal.

The Crown submitted to the Ontario Court of Appeal that the rulings in this case had "the potential to cripple the investigation of drinking and driving offences where a collision has occurred". The Crown suggested that the statements made by the accused were admissible for the limited purpose of establishing that the officer had grounds to make an

approved screening device demand and such use did not violate the right against self-incrimination under s. 7. In support of its argument the Crown pointed out that a motorist's compelled participation in an ASD test is admissible to support an officer's grounds to make a breath demand, thus compelled statements made at the scene of a collision are also admissible when they are being used for the same limited purpose. The Crown, in the alternative, contended that if there was a s. 7 infringement it was justifiable under s. 1 of the *Charter*.

Justice LaForme, speaking for the Court of Appeal, rejected the Crown's arguments. Statutorily compelled statements are only admissible to prove non-compliance under the *Highway Traffic Act* but not admissible for any other purpose including for the purpose of establishing reasonable grounds. Unlike breath testing where a motorist's compelled participation in an ASD test is admissible to support an officer's grounds to make a breath demand, "the questioning by police in those cases does not involve compelled answers. In each of them the motorist can refuse to answer if he or she chooses; they are not forcefully enlisted in aid of their own prosecution," said the Court of Appeal. For example, in the case of a breath demand made by a police officer pursuant to s. 254(5) of the Criminal Code, the motorist is legally obligated to comply with the demand; nevertheless, s. 7 continues to furnish him or her with the right to choose whether or not to speak with the police – a choice statutory compulsion clearly eradicates. There is absolutely no legal compulsion to speak or provide information in any of the cases cited." The accused's statutorily compelled admission was not admissible for the purpose of establishing grounds for making either the ASD or the breath demand. Unlike s. 10(b) where the right to counsel can be "limited until arresting officers have developed reasonable grounds to effect an arrest, the choice of whether or not to remain silent – and thus prevent self-incrimination – nevertheless remains."

The Court of Appeal also commented on the Crown's submission that not permitting use immunity "has the potential to cripple the investigation of drinking and driving offences where a collision has occurred". Even though information

BY THE BOOK:

Accident Reports: Ontario's *Highway Traffic Act*

Duty to report accident

s. 199 (1) Every person in charge of a motor vehicle or street car who is directly or indirectly involved in an accident shall, if the accident results in personal injuries or in damage to property apparently exceeding an amount prescribed by regulation, report the accident forthwith to the nearest police officer and furnish him or her with the information concerning the accident as may be required by the officer under subsection (3).

Officer may direct person to report accident at another location

(1.1) If, on reporting the accident to the nearest police officer under subsection (1), the person is directed by the officer to report the accident at a specified location, the person shall not furnish the officer described in subsection (1) with the information concerning the accident but shall forthwith attend at the specified location and report the accident there to a police officer and furnish him or her with the information concerning the accident as may be required by the officer under subsection (3).

... ...

Duty of police officer

(3) A police officer receiving a report of an accident, as required by this section, shall secure from the person making the report, or by other inquiries where necessary, the particulars of the accident, the persons involved, the extent of the personal injuries or property damage, if any, and the other information that may be necessary to complete a written report concerning the accident and shall forward the report to the Registrar within ten days of the accident.

deriving from the duty of a motorist by statutory compulsion cannot be used in a criminal proceeding there are other ways in which police might investigate so as to acquire information independently of the accident report that can be used. For example, an officer may inform the driver that they intend to secure the details of the accident report from sources other than the driver, thus terminating the statutory duty to report. Or police might tell the driver that they will postpone the taking of an accident report until after they have questioned him or her. With these alternatives, Justice LaForme concluded the Crown's argument was unfounded.

Since there was no argument raised in the courts below that a s. 7 infringement was justifiable under s. 1 of the *Charter*, the Court of Appeal refused to consider it. The Crown's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

REASONABLE SUSPICION LACKING FOR DETENTION & DOG SNIFF

R. v. Blanchard, 2011 NLCA 33

Police stopped the accused for speeding 110 km/h in a 100 km/h zone. The highway was icy and police decided to warn the driver. The driver produced a driver's licence and admitted that he had been speeding a bit. During the initial contact the officer noticed some indicators that made him suspicious that the accused may be involved in criminal activity:

- The accused's legs were shaking uncontrollably. When asked why, the accused said "I don't know";
- His signs of nervousness did not subside even though the officer explained there would be no ticket;
- On the passenger side on the floor there was a McDonald's restaurant bag being used for garbage which was quite full indicating that the driver had been traveling for some time. The vehicle also contained a 2 liter pop bottle partially full, cheesies or chip packages on the seat and a pizza box on the floor in the back seat, all of which suggested that the driver was eating on the run and trying to get from point A to point B quickly;
- There was a cologne spray bottle in the center console and an air freshener in the vehicle. In the officer's training and experience people carrying drugs often use spray cologne and/or air fresheners as a masking agent to cover up the smell of marihuana;
- On the passenger floor there was a map of Nova Scotia indicating that the driver had likely come from that province, which the officer knew was a potential source province for the import of marihuana into Newfoundland;
- The back seat contained two duffle bags which suggested an overnight trip. There were also hubcaps close to the top surface of "other stuff" in the back seat suggesting that there must be something in the trunk displacing the hubcaps which would normally be stowed there. Through his training the officer had learned that people transporting marihuana or other controlled substances often conceal them by putting them in the trunk.

A computer query on the accused's licence and registration checked out fine. The officer returned the documents to the accused, told him about the road conditions, and indicated to him that he was free to go. The officer stepped back from the vehicle, gesturing with his left arm that the accused could proceed down the road. Then, the officer stepped in again and asked "would you mind if I ask you a few more questions about your trip?" The accused said that he could. After a few questions the responses made the officer more suspicious.

The officer felt he had a reasonable suspicion that the accused was involved in criminal activity, requested that he exit the vehicle, and placed him under detention. He read him his *Charter* right to counsel and the standard police warning. The accused requested to speak to a lawyer and was allowed to talk on the police telephone in the police car with Legal Aid while officers stood outside the

car. Once the call was completed the officer called a dog handler to the scene to do a sniff around the vehicle. In the meantime, a request for a consent search of the vehicle was refused. Feeling confident that a search was going to be conducted a tow truck was called. After a 70 minute delay a dog handler arrived and walked around the car, giving two positive sit indications that there were drugs in the vehicle (once between the driver and rear doors on the driver's side and once at the trunk). The accused was then arrested for possession of a controlled substance for the purpose of trafficking and re-Chartered, cautioned, and warned. The vehicle was towed to the police detachment and a search warrant was obtained. The vehicle was subsequently searched and 59 half-pound bags of marihuana were found in duffle bags in the back seat and in the trunk. The accused was charged with possession of marijuana for the purposes of trafficking.

"[T]he dog sniff led to the search warrant, which led to discovery of the drugs, which led to [the accused's] arrest. The unlawfulness of the dog sniff caused this cascade of Charter violations."

A Newfoundland Supreme Court trial judge concluded that the accused was psychologically restrained and subject to an investigative detention when he was released from the "routine traffic stop" and the police started to ask a few more questions. In her view, the police should have advised the accused of his right to counsel and because they did not there was a breach of s. 10(b) while asking the additional questions. Furthermore, the judge ruled that the police breached s. 9 of the *Charter* because they did not have sufficient cause to detain. "Treated collectively and objectively, on the facts before me, I am left with the picture of an extremely nervous young driver (whose anxiety [the officer] said did not seem to abate despite being advised that he was not being given a ticket), traveling the Trans Canada Highway eastbound at a time of day consistent with ferry traffic, with a map of another Atlantic Province and a cologne bottle in plain view," said the judge. "These factors, in combination with the fast food containers and loaded back seat, were, in my opinion, insufficient to justify the reasonable suspicion test for the exercise of police authority to detain." As for the time it took waiting for the arrival of the dog handler, the judge said it spoke "against the reasonableness of the investigative detention in the overall circumstances." Since the police did not have a reasonable suspicion to detain the accused they did not have reasonable suspicion to conduct the perimeter sniff search. This search breached the accused's s. 8 *Charter* right and the arrest, which was based on the results of the sniff search, was unlawful as was the search warrant obtained later. The evidence, however, was admitted under s. 24(2). "I do not believe that to admit the drugs in these circumstances would either shock the conscience of the public or cause further loss of confidence in the administration of justice," said the trial judge. "In fact, I believe the reverse to be true. I conclude that 'a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the [exclusion] of the evidence would bring the administration of justice into disrepute'". The accused was convicted.

The accused appealed to the Newfoundland Court of Appeal. Justice Rowe, authoring the Court of Appeal's opinion, substantially agreed with the findings of the trial judge regarding the *Charter* violations. "Her key finding was that the police did not have 'reasonable suspicion' to conduct the dog sniff," he said. "This was critical, as the dog sniff led to the search warrant, which led to discovery of the drugs, which led to [the accused's] arrest. The unlawfulness of the dog sniff caused this cascade of Charter violations."

Although not required to do so, Justice Rowe made comment in *obiter* about the delay in the dog handler arriving on scene:

> I would raise a (perhaps heterodoxical) question. Provided there is a valid basis to call for a dog sniff, should it matter how long it takes to get a dog on site, provided reasonable diligence is used by the police to do so? Given the vast scale of this country ... we are not Singapore ... in many places, of necessity, there will be

> significant delays in getting a dog to where it is needed. In such circumstances, why not release the individual, but impound the vehicle pending the dog's arrival? Otherwise, is not the investigation of drug cases seriously impaired outside of places where a sniffer dog is readily available? [para. 35]

As for the trial judge's s. 24(2) analysis, Justice Rowe also agreed the evidence was admissible:

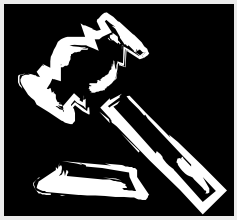
> What is critical is that the police believed they were acting lawfully and that they could not reasonably have been aware they were not so doing, in that their actions preceded the guidance provided by the Supreme Court of Canada in Kang-Brown, A.M. and Grant.
>
> The police officers proceeded in a way that they reasonably believed was in accordance with law. They obtained evidence that was highly reliable. With the benefit of subsequent guidance from the Supreme Court we now know they violated [the accused's] Charter rights. Some of those violations were significant; however, none amounted to a grave infringement on his liberty or personal dignity. That is important. [paras. 38-39]

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

Complete case available at www.canlii.org

LEGALLY SPEAKING:

Murder & Motive



"Motive is not an element of the offence of murder. Murders are sometimes committed in the absence of motive. However, proof of motive assists in the establishing the necessary mens rea of the offence ..." - Alberta Court of Appeal Justice Ritter in *R. v. Martel*, 2011 ABCA 114 at para. 21.

ERROR TO TEST INDIVIDUAL PIECES OF EVIDENCE OFFERED TO ESTABLISH GROUNDS

R. v. Usher, 2011 BCCA 271

At about 3:00 am a civilian motorist called 911 to report that there was a possible impaired driver weaving on the road and shoulder at varying speeds between 80 km/h and 130 km/h, almost striking another vehicle. A police officer intercepted the vehicle, followed it, and observed it was using all of its lane to drive in and changed lanes without signalling. The officer activated the emergency lights on his marked police car but the accused did not pull over for about 1.5 km. When asked where he was coming from the accused's response was difficult to understand and a bit slurred. He had a blank look on his face, his eyes were glassy, and he was slow and deliberate in his actions and speech. The accused said he "had a couple", held up an open and partly-consumed can of beer, and there was an odour of liquor in the vehicle. When asked for his driver's licence and registration the accused put them on his lap instead of handing them to the officer. He then produced them when the officer asked again. When requested to get out of the vehicle the accused was unsure of his balance, but he did not stumble. He walked normally to the rear of the vehicle but his movements were slow and deliberate. At this time the officer noted a "quite strong" odour of alcohol coming from the accused, who still appeared slow and dazed and his speech was slurred. Based on the driving pattern reported by the civilian, his own observations, and the smell of alcohol from the accused, the officer formed the opinion that the accused's ability to drive a vehicle was impaired by alcohol. The accused was arrested, the breath demand administered, and he subsequently provided two samples of his breath producing readings of 160 mg% and 150 mg%. He was charged with over 80 mg% and impaired driving.

At trial in the British Columbia Provincial Court the officer was unable to provide details or examples of the slurred speech except for their conversation at

the outset. He said that the accused "seemed off" and "not quite right" and that he looked like a drunk person. The officer also said that the accused looked noticeably different at court than he had been during their encounter. He was alert and not confused or dazed as he had been on that night. The accused testified he had consumed two to three rye and coke and some beer before he drove about two-and-a-half hours prior to being stopped and two to three beers while driving. He argued that the officer did not have reasonable grounds to believe he committed an offence under s. 253 and therefore the breath samples were obtained in violation of his rights under s. 8 of the *Charter*.

> "The test for establishing reasonable grounds is not onerous. The Crown need not establish a prima facie case; it will be enough to show the findings of fact objectively support the officer's subjective belief that the suspect was impaired, even to a slight degree."

The trial judge acknowledged that the officer had the necessary subjective belief that the accused's ability to drive was impaired by alcohol. However, he ruled that the officer's belief was not objectively reasonable. He found the officer's actual experience with impaired drivers was somewhat limited. Furthermore, the strong smell of alcohol emanating from the accused was a significant symptom of impairment for the officer. But the officer did not testify where the strong smell came from and the judge was not prepared to infer that the odour was coming from his mouth. "There are any number of possibilities as to why a person would give off a strong smell of alcohol other than having consumed it," said the judge. "For example, since [the accused had been drinking as he drove along, it is conceivably possible alcohol had been spilled on [his] clothing. Unless the strong smell was from [the accused's] breath, it would not have been realistic for [the officer] to believe the strong smell was caused by [the accused] having consumed alcohol." The breath certificates, however, were admitted as evidence and the accused was convicted of driving while over 80 mg%, but he was acquitted of impaired driving.

The accused appealed his conviction to the British Columbia Supreme Court arguing the trial judge erred in admitting the breathalyzer readings under s. 24(2) of the *Charter*. The Crown, on the other hand, submitted that the trial judge erred in finding there was no objective basis for the breathalyzer demand and, even if there was a *Charter* breach, the trial judge's ruling under s. 24(2) was correct. The appeal judge upheld the lower court's judgments on both points. He agreed with the trial judge's finding of a s. 8 *Charter* breach because the objective component required for reasonable grounds for the breathalyzer demand had not been satisfied. As well, he agreed that the trial judge was not incorrect in admitting the evidence. The accused's appeal was dismissed.

The accused then appealed to the British Columbia Court of Appeal submitting that both the trial judge and the appeal judge erred in admitting the breathalyzer results under s. 24(2). The Crown argued again that the judges below erred in finding that the officer lacked objective grounds to make the breath demand. And if they didn't err, the Crown maintained that both judges correctly ruled the breath samples were admissible under s. 24(2).

Objective Reasonable Grounds

Under s. 254(3) of the *Criminal Code* a peace officer is authorized in making a demand for breath samples if the officer has reasonable grounds to believe that the suspect's ability to drive was impaired by alcohol within the preceding three hours. "The requirement of reasonable grounds has both a subjective and objective component," said Justice Neilson writing the Court of Appeal's opinion. "The officer must subjectively have an honest belief that the suspect committed an offence, and that belief must be supported by objective grounds." In this case, the officer had the necessary subjective belief that the accused's ability to drive was impaired. However, the trial judge ruled that the objective basis for that belief was not reasonable. In looking at the objective test for reasonable grounds Justice Neilson put it this way:

> The test for establishing reasonable grounds is not onerous. The Crown need not establish a prima facie case; it will be enough to show the findings of fact objectively support the officer's subjective belief that the suspect was impaired, even to a slight degree. As well, the authorities recognize the reasonableness of the officer's opinion must be judged by reference to the totality of the circumstances, and in the situation in which it was formed; a roadside investigation that demands a quick and informed decision, without the luxury of reflection. [references omitted, para. 30]

"It is trite law that, in assessing whether the Crown has established reasonable grounds, the indicia of impairment must be evaluated in their totality. It is an error of law to test individual pieces of evidence offered to establish reasonable grounds."

Using these principles the Court of Appeal concluded the trial judge erred. The accused had been driving erratically and was drinking as he drove. He demonstrated a number of the standard physical signs and symptoms of impairment. These facts provided a reasonable basis for a breathalyzer demand:

> An opinion as to whether a person's ability to drive is impaired is not an expert opinion, and may be given by a lay person. Indeed, the fact one witness has seen more impaired drivers than another is not in itself enough to prefer the evidence of the more experienced witness. Having said that ... the authorities recognize a police officer's experience may strengthen his/her opinion but, typically, this is expressed in terms of an ability to recognize and interpret subtleties that may not be apparent to a layperson. [references omitted, para. 34]

In this case the officer was a credible witness. He had particular skill and training concerning impaired drivers, and was in a better position than a layperson to assess symptoms of impairment. Furthermore, the trial judge erred by placing too much weight on the officer being unable to testify that the odour of alcohol emanated from the accused's breath. "It is trite law that, in assessing whether the Crown has established reasonable grounds, the indicia of impairment must be evaluated in their totality. It is an error of law to test individual pieces of evidence offered to establish reasonable grounds," said the Court of Appeal. "In the composite circumstances of this case, that one factor [failure to trace the smell of alcohol to the accused's breath] did not preclude a conclusion that there were reasonable grounds for his belief that [the accused's] ability to drive was impaired." The lower courts erred in ruling there was an insufficient objective basis for the breathalyzer demand and the accused's s. 8 *Charter* rights had not been violated. Since there was no *Charter* breach there was no reason to consider s. 24(2). The accused's appeal was dismissed and his conviction for driving with a blood alcohol level over 80 mg% was affirmed.

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

KNOWLEDGE THAT GUN LOADED INFERRED FROM CIRCUMSTANCES

R. v. Eastgaard, 2011 ABCA 152

Police had two vehicles under aerial and ground surveillance including a Suburban which was occupied by the accused sitting in the right front passenger seat. The Suburban was under constant surveillance from the time it left a gas station until it was stopped an hour later by a Tac Team. An officer conducting aerial surveillance from a police helicopter saw the accused get out of the Suburban, approach some bushes and rocks where he crouched down for two to three seconds, and then get back into the Suburban and leave. After the police stopped the Suburban a member of the ground surveillance was directed to the exact spot the accused had crouched down and discovered a loaded, prohibited firearm (a handgun). At the time of his arrest the accused was the subject of three firearms prohibitions, was wearing a bullet proof vest, and had been shot about two months before.

At trial in the Alberta Court of Queen's Bench the judge found the only reasonable inferences to be

made were that the accused placed the firearm under the rock where it was found, that he had physical or actual possession of the gun and a substantial measure of control over it, and that he must have known what it was. The accused was convicted of possessing a loaded firearm under s. 95 of the *Criminal Code*, among other charges. He then appealed his conviction to the Alberta Court of Appeal arguing that the Crown did not prove that he knew the firearm was loaded.

"[P]roving actual knowledge [the firearm was loaded] does not require the accused to admit that the firearm was loaded. Knowledge can be inferred from the circumstances if that is the only reasonable inference to be drawn from the evidence."

A majority of the Court of Appeal noted that a conviction under s. 95 requires that the Crown prove beyond a reasonable doubt that the accused knew, or was wilfully blind, that the firearm was loaded. Mere recklessness is not enough. In order to prove knowledge it must be proven that the accused was aware that he had physical custody of the gun and that he knew it was loaded, coexisting with an act of control. But "proving actual knowledge does not require the accused to admit that the firearm was loaded," said the majority. "Knowledge can be inferred from the circumstances if that is the only reasonable inference to be drawn from the evidence."

In this case Justices Ritter and Phillips concluded that "the trial judge could infer that the [accused] knew the true nature of the firearm and that it was loaded from the manner in which [he] placed the firearm in the bushes":

1) "The [accused] was under three firearms prohibition orders and did not have a licence or permit to own a handgun when he had possession of the handgun in question;

2) [He] had been shot just two months prior;

3) Both the [accused] and the driver of the Suburban were wearing bullet proof vests when they were arrested;

4)The [accused] deposited the firearm under the rock while under aerial and ground surveillance by the police; and

5)When recovered from the rocks by the police, the firearm was a fully functioning . 380 calibre handgun with 8 bullets loaded in the magazine.

Looking at this uncontradicted evidence and the entirety of the circumstances of this case, we are of the view that all of the indicia for knowledge were properly before the trial judge for him to conclude that the [accused] must have known what the gun was and that it was loaded. The facts show that the [accused] operated in a milieu in which he could be expected to be involved in confrontations and was no stranger to confrontations involving guns. In those circumstances, carrying a loaded firearm with full knowledge of that state is a logical inference to be drawn.

.....

In the circumstances of this appeal, the [accused] was prohibited from possessing a firearm of any sort, had been involved and shot in an earlier shooting, and was armed regardless of the prohibitions. This suggests that he was prepared to deal with further shootouts. The benefit of using a loaded firearm is obvious. [paras. 13-16]

The evidence was sufficient to support the inference that the accused had the requisite knowledge and that it was the only reasonable inference to draw from the circumstances.

Justice Bielby, however, disagreed with the majority. In her view, the circumstantial evidence was insufficient to find the accused knew the gun was loaded.

Complete case available at www.albertacourts.ab.ca

Note-able Quote

"Let's say you go to dinner with a great manager; most likely you come away thinking he is a great man. Yet, if you go to dinner with a great leader, you will come away thinking you are a great person. The difference being, of course, that a great leader makes you feel important, points out your strengths and empowers you… and a manager, not so much." Author Unknown

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