ISSUES OF INTEREST

A Journal Devoted to Topical Policing and Legal Issues for Operational Police Officers in British Columbia

Vol. 49 No. 4 | Justice Institute of British Columbia - Police Academy | October, 1998

SEARCHES - IS THE PENDULUM SWINGING BACK?

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Introduction

Two recent cases from the British Columbia Court of Appeal ("B.C.C.A."), *R v. Ferris*[1] and *R v. Yamanaka,*[2] have defined significant search authority relating to "investigative detention" and "articulable cause" that will decidedly impact police practices. The purpose of this article is to examine these cases and consider whether the pendulum is beginning to swing back to permit certain searches based on the operational realities confronting police officers.

Background

The *Ferris* case raised for the first time in the B.C.C.A. the issue of an "investigative detention" (also known as frisk search, pat down, stop and frisk or Terry Stop in the U.S.) and the existence or scope of the power of the police to search a person detained on the basis of "articulable cause."

In *Ferris*, two police officers queried the licence plate of a vehicle they were following. The licence plate was stolen and when the emergency equipment was activated on the police vehicle the suspect vehicle did not stop. Eventually the suspect vehicle entered a parking lot, the driver bolted from the vehicle with one officer in pursuit and the other officer held the two passengers in the vehicle at gun point and waited for backup. When assistance arrived, the officer ordered the passengers out of the vehicle. One of the passengers, Ms. Ferris, was advised by the officer that she was "under investigation for possession of stolen property", she was handcuffed behind her back and then subjected to a "pat down" search. Ms. Ferris provided a name when asked, and indicated her identification was inside the waist pack she was wearing. The officer removed the pack to look for identification and for "any weapons she may have had in the pouch." Aside from identification, the officer located two ounces of cocaine in the waist pack.

The trial judge found the search constituted a breach of s. 8 (reasonable search and seizure) of the *Charter* and excluded the evidence. The B.C.C.A. was called upon to consider the validity of the search of the passenger's waist pack during an "investigative detention" under s.8. There are three requirements for a search to be constitutionally valid: (1) it must be authorized by law; (2) the law itself must be reasonable; and (3) the manner of the search must be reasonable.[3] Ryan J.A. (Newbury J.A. concurring) and Finch J.A. agreed, for slightly different reasons, that in certain circumstances, there is common law authority based on articulable cause to investigatively detain and search individuals.

Authorized by Law

As a preliminary point, Ryan J.A. noted that the difference between the *Ferris* case and the traditional search cases is that here: (1) the detention was intended to be brief; (2) the police were investigating a crime which was either in progress or had just occurred; and (3) the search was undertaken for purposes other than to discover contraband.[4]

The Detention

The first task for the Court was to determine whether the (a) (investigative) *detention* and (b) (frisk) *search* were authorized by law. Since there was no statutory (or incident to arrest) authority for the search the Court had to consider whether at common law there is a police power to "detain for investigation." Relying on the Ontario Court of Appeal ("O.C.A.") in *R v. Simpson,*[5] which held that investigative detentions are lawful if based on *articulable cause*, all three B.C.C.A. justices agreed "there is a common law police power to detain a person in the course of a police investigation."[6] The *Simpson* test for articulable cause is:

> ...a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation...A "hunch" based entirely on intuition gained by experience cannot suffice, no matter how accurate that "hunch" might prove to be.[7]

However, Doherty J.A. in *Simpson* warned:

> I should not be taken as holding that the presence of articulable cause renders any detention for

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This Journal is published four times a year (January, April, July, October). The annual subscription rate is $15. Rates and specifications for advertising are available from the Technical Assistant. Articles appearing herein do not necessarily express the views of the Justice Institute, Editor, Associate Editor, Editorial Board or the author's agency or employer. **(ISSN:0840-8254)**

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Submissions(750 - 1500 words) on topical operational issues are invited from police officers and individuals in associated professions or disciplines. Articles must be typewritten, double-spaced on letter size paper, quotations must be indicated, and references fully cited in endnotes. Diskette submissions in ASCII format (i.e. "Text Only") are preferred. The Editor reserves the right to alter articles to conform with publication requirements. Contributions not accepted for publication will not be returned to the author unless accompanied by a stamped, self-addressed envelope.

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investigative purposes a justifiable exercise of a police officer's common law powers. The inquiry into the existence of an articulable cause is only the first step in the determination of whether the detention was justified in the totality of the circumstances and consequently a lawful exercise of the officer's common law powers...Without articulable cause, no detention to investigate the detainee for possible criminal activity could be viewed as a proper exercise of the common law power.[8]

Ryan J.A.agreed with the above test but cautioned that "We are dealing here with on-the-street observations by police officers who must act quickly" and in such cases, "the reasonableness of the officer's decision to stop a person whom the officer suspects is committing or has just committed a crime does not turn on the availability of less intrusive investigatory techniques [because] [s]uch a rule would unduly hamper the ability of the of the police to make swift, on-the-spot decisions."[9]

In the *Ferris* case, the accused was the passenger in a moving vehicle that displayed stolen plates and in all the circumstances it was reasonable for the police officers to "suspect" that the occupants of the vehicle might be engaged in some form of criminal activity. As such, Ryan J.A. concluded that it was "beyond dispute that the police had articulable grounds to detain the passengers to determine what, if any, criminal activity was taking place."[10] On the facts, however, the authors also believe that "reasonable grounds" existed that the accused had committed a criminal offence and she could have been arrested and searched as an incident of arrest, thereby avoiding the entire issue of investigative detention and articulable cause.

The Search

Since the *investigative detention* was authorized/justified, the second matter to be determined was whether the *search* was justified. In other words, is there a common law authority to search incident to investigative detention based on articulable cause? In considering the concept of "stop and frisk", Ryan J.A. relied on the United States Supreme Court ("U.S.S.C.") decision in *Terry v. Ohio*.[11] As Ryan J.A. noted, the majority in *Terry* "acknowledged the legitimate government interest in effective crime prevention and detection [and]... confirmed that where a police officer observes unusual conduct that leads the officer reasonably to conclude in light of his or her experience that criminal activity may be afoot, the police officer may approach and briefly detain the suspect to make reasonable inquiries aimed at confirming or dispelling the officer's suspicions."[12] In addition to the state interest in investigating crime, there is also the more pressing interest of protecting police officers who are investigating crime. As noted by the majority in *Terry*:

> The crux of this case, however, is not the propriety of [the police officer's] taking steps to investigate petitioner's suspicious behaviour, but rather, whether there was justification for [the police officer's] invasion of Terry's personal security by searching him for weapons in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.... [W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest.[13]

In approving the stop and frisk procedure for articulable cause, the

majority in *Terry* distinguished searches incident to arrest as follows:

> An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. Moreover, a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime.[14]

In a powerful statement, Ryan J.A., after adopting the reasoning in *Terry*, stated:

> If the police have the duty to determine whether a person is engaged in crime or is about to be engaged in crime they should not be obliged to risk bodily harm to do so. It is my view that the police are entitled, if they are justified in believing that the person stopped is carrying a weapon, to search for weapons as an incident to detention. The question for the court must be whether the search was reasonably related in scope to the circumstances which justified the interference in the first place. I have concluded that in proper circumstance the police are entitled to search for weapons as an incident to an investigative stop. The seriousness of the circumstances which led to the stop will govern the decision whether to search at all, and if so, the scope of the search that is undertaken... Questioning an elderly shopper about a suspected shoplifting would not ordinarily require a search for weapons; questioning someone after a bank robbery might require a search of the detainee and his or her immediate surroundings.[15]

Scope of the Search

In considering the *scope of the search*, Ryan J.A. held:

> The police were conducting a spontaneous as opposed to a planned investigation. Given those circumstances it would be unreasonable to require them to determine with precision the least intrusive manner of securing their safety in the initial stages of their investigation. As well, at some point soon the detention would come to an end and the pack would be returned. The officers were entitled to ensure that when this was done they would not be placing themselves in danger by handling the respondent a concealed weapon.

Finch J.A. noted that in determining whether the search for weapons was reasonably necessary, "the police perception of reasonable necessity depends very much on the particular circumstances in which the police officer finds himself."[16] In this case, the trial judge found that because the accused was handcuffed behind her back, the waist pack was on the roof of the car and other officers were present, there was no police or public safety issue. However, Finch J.A. commented that "[c]ommon sense dictates that a prudent police officer engaged in an investigative detention will take care to protect himself and others from harm from the beginning of that detention to its termination."[17] Thus, searching the pouch before it was returned was reasonable, although the officer did not directly testify on this point.

Reasonableness of Law and Conduct of the Search

In relation to the remaining two elements for a valid search under s. 8 of the *Charter*, Ryan J.A. observed that having found that an investigative detention and a search incidental to that investigation meets the test of reasonable necessity, it cannot be said that the common law power is unreasonable. Further, the scope and manner of the search in this case was not unreasonable.[18]

Further Application

More recently, in *Yamanaka*, *supra*, McEachern C.J.A. (Cumming and Finch J.A. concurring) approved and applied the principle of investigative detention based on articulable cause. In *Yamanaka*, two police officers responded to several 911 complaints of gunfire at 5:30 a.m. one morning. The first officer arrived in the area and spoke with two individuals standing beside an older model vehicle. They stated their vehicle had broken down and backfired several times. A second officer arrived and observed drywalling equipment in the vehicle and found the backfire explanation suspicious. The second officer noted that the accused was holding an athletic bag very closely. The accused stated he was an electrician and there were electrical tools in the bag (which did not fit with the kind of tools in the vehicle). Concerned about weapons, the officer asked to search the bag. The officer found break-in instruments. The officer also testified that the individuals did not appear to belong in the neighbourhood.

The Court found:

> In this case, the justification for a lawful search is stronger than it was in *Ferris* because the officer's knowledge of complaints of gunshots in the vicinity where the appellant was found was good reason to be concerned about his own safety.... These facts... constituted articulable cause temporarily to detain the appellant for the purposes of investigating the complaints that had been received and to search the appellant for

weapons in the course of that investigation.[19]

Conclusion

The foregoing cases may have reversed the pendulum restricting police powers to search in appropriate situations. The concepts of articulable cause and investigative detention import significant principles from the United States jurisprudence where it has assisted police in their efforts to protect themselves and the public.

However, the decisions dealing with articulable cause tend to use imprecise and contradictory terminology. As previously noted by Ing,[20] there is some ambiguity over exactly what threshold is required to form articulable cause. While it appears a "hunch" is insufficient and "reasonable grounds" are not necessary to form articulable cause, "reasonable suspicion" (Doherty J.A.), a reasonable conclusion (U.S.S.C.), or "suspecting" (Ryan J.A.) that a person may be involved in criminal activity have been found to be sufficient. Officers must be able to articulate, based on the "totality of the circumstances," the facts and reasons they relied upon to formulate the need for an investigative detention and/or search. It is clear that police officers must receive instruction regarding the application of these principles. More importantly, where reasonable grounds exist to effect an arrest, it is our view that the search incident to arrest authority will always provide a more secure foundation upon which to conduct business.

Endnotes:

1. (15 June 1998), unreported, Van. Reg. No. CA02194.
2. (18 August 1998) unreported, Van. Reg. No. CA023333; see also, *R v. Davies* (25 June 1998) unreported, Whitehorse Reg. No. CA-97-YU382 (Y.T.C.A.) and *R. v. Lal* (Dec. 1996) unreported, Van. Reg. (B.C.S.C.).
3. *Hunter v. Southam*, [1984] 2 S.C.R. 145; see also, *R. v. Collins*, [1987] 1 S.C.R. 265 and *R. v. Stillman*, [1997] 1 S.C.R. 607.
4. *Supra*, note 1 at para 27.
5. (1993), 79. C.C.C. (3d) 482.
6. *Supra*, note 1 at paras. 39 and 68.
7. *Ibid*, Ryan J.A. at para. 37 quoting Doherty J.A. at 501-2.
8. *Ibid.* at para 38 quoting Doherty J.A. at 503.
9. *Ibid*, para. 39, adopting the comments of the U.S.S.C. in *U.S. v. Sokolow,* 104 L. Ed. 2d 1 (1989) at p. 12.
10. *Ibid*, para. 40.
11. 20 L.Ed. 2d 889 (1968); see also, *U.S. v. Cortez* 449 U.S. 411 (1981).
12. *Supra*, note 1 at para. 49
13. *Ibid*, para 50 quoting from pp. 907-8.
14. *Ibid*, para. 51 quoting from p. 909.
15. *Ibid*, paras. 53-4.
16. *Ibid*, para. 71.
17. *Ibid*, para 76.
18. *Ibid*, paras 61-2.
19. *Supra*, note 2 at paras. 13 and 15.
20. Steven Ing, "Articulable Cause: Police Common Law Authority to Detain a Suspect Absent Reasonable Grounds for Arrest" (1997) 48:4 *Issues of Interest* 4.

Labour Relations In The RCMP

Brendan J. McKenna, B.A.

Introduction

1998 signals the 125th anniversary of the RCMP. Historically, the RCMP has been a rigid paramilitary force, and as such, little thought was given to concepts like participatory management with the rank-and-file.[1] In particular, for more than 100 years, there was *no* collective system in place to address the concerns of the rank-and-file. In fact, in 1918 an Order-in-Council was signed prohibiting members of the RCMP, under pain of dismissal, from forming or becoming a member of any organization to deal with employment issues. That Order was only rescinded in 1974, after the eruption of unrest within the rank-and-file over pay and working conditions.

In the face of embarrassing stories like the 1972 *Maclean's* article by Jack Ramsey,[2] a blistering indictment of RCMP management, and the boiling over of rank-and-file dissention in large urban centres, Commissioner Nadon was forced to try and address labour and management issues. The result was that RCMP members, without a vote, had foisted upon them an internally organized, funded and management-controlled employee "representation" system to address their concerns.[3] This Division Staff Relations Representative Program ("DSRRP") was then, and still is, hailed by management and the government as an "effective" tool to address employee concerns. The mandate of the DSRRP is contained within the *Commissioner's Standing Orders* ("CSOs"), which are enacted by the Commissioner's office.[4] RCMP members are not free to bargain with their employer, the federal Treasury Board. Any communication with Treasury Board relating to pay and benefits for members is done through the Commissioner.

For many, the illegitimacy of this framework was highlighted recently when the Commissioner, who is purportedly negotiating pay matters in the best interests of members, received a 17% pay raise (*i.e.* over $20,000.00) and other bonuses *before* the issue of pay (which had been frozen for several years) for the rank-and-file was settled.[5] Despite the actual or perceived conflicts of interest that exist in such a situation, this process is still upheld by the Commissioner and the federal government as a viable and legitimate way of conducting business on behalf of members. Without collective bargaining and independent binding third-party review, the Commissioner essentially has unfettered control over the members of the RCMP with regard to grievances and discipline, and he is inappropriately responsible for asserting pay and benefits before the Treasury Board on behalf of the rank-and-file.

The purpose of this article is two-fold. First, I will provide some examples of why the current RCMP labour relations regime can no longer be supported. Second, I will outline the appeal of S/Sgt. Delisle to the Supreme Court of Canada to have the various legislative provisions that currently prohibit RCMP members from forming an association struck down as unconstitutional.

The Past and Present

There is considerable evidence that the current RCMP labour relations regime can no longer be sustained. In 1974, as result of widespread labour unrest within the RCMP, the Marin Commission was appointed to review matters relating to the public complaints process, grievances and internal discipline in the RCMP.[6] Among other things, the Marin Commission determined that the RCMP discipline and management system was basically punitive in nature, and was subject to considerable formal and informal abuse by commissioned officers. The Marin Commission recommended a remedial discipline process, and to some degree, their recommendations in that regard have been implemented. The Marin Commission also pointed out the apparent conflict that exists when the RCMP Commissioner represents members before Treasury Board on pay and benefit issues.[7]

Approximately ten years later, when some of the recommendations of the Marin Commission were finally legislated, two bodies were created to oversee internal accountability matters: the Public Complaints Commission ("PCC") and the External Review Committee ("ERC"). The ERC has limited authority to review certain types of grievances and discipline matters. It also has the mandate to make *recommendations* to the Commissioner, but those recommendations are *not* binding. It is self-evident that any oversight body that can only make recommendations, rather than binding decisions, leaves the final decision in the hands of the very management that made the decision in the first place. Recent data regarding ERC reviews suggests that in 27.5% of internal discipline cases the Commissioner has disagreed with and/or rejected the findings of the ERC.[8]

A clear example of the limited authority the ERC has over RCMP management is provided by the case of *Cpl. "A" v. Appropriate Officer "B"*.[9] Section 40(1) of the *RCMP Act*[10] empowers the Force to initiate internal Code of Conduct investigations. Section 40(2) requires members to answer questions relating to the investigation, even though they may incriminate the member or subject the member to a penalty (*i.e.* compelled, ordered, required or duty statements). However, s. 40(3) precludes the admission of answers in any criminal, civil or administrative proceeding. In *Cpl. "A"*, the member answered questions during an internal investigation. The member specifically objected to answering all but three questions posed by the investigator. At the internal Adjudication Board hearing, the RCMP attempted to enter into evidence the answers to the three questions Cpl. "A" did not object to answering. The issue was whether the answers were inadmissible because of subsection (3).

A body of case law has developed over the years dealing with this issue. For example, the decision of the ERC in *Special Cst."A"* clearly stated that:

> The member is not compelled in any way to object to answering to invoke the protection of the Act. Just as section 13 of the *Charter, subsection 40(3) automatically protects a person compelled by law to make incriminating statements*.[11] (Emphasis added.)

The internal Adjudication Board in the *Cpl. "A"* case properly ruled that "the answers to questions were automatically protected by s. 40(3), regardless of whether he objected or was ordered to answer."[12]

The Adjudication Board's decision to exclude Cpl. "A's" answers was appealed to the ERC, which, after a detailed analysis, upheld the Board's decision. However, on further review by the RCMP Commissioner, the findings and recommendations of the ERC were rejected, as well as previous rulings of the Ontario Provincial Court in *R. v. Radeschi*,[13] the New Brunswick Court of Queen's Bench in *Murphy v. Keating*,[14] and the B.C. Court of Appeal in *Gustar v. Wadden*,[15] that directly or indirectly held that an objection/order is not required to obtain the protection of s. 40 (*i.e.* the protection is automatic).

Aside from the foregoing cases dealing with ordered statements, the Commissioner was also fully aware of a review undertaken by Rene J. Marin, on behalf of the RCMP, of s. 40 statements.[16] The Marin Report confirms that s. 40 statements should be automatically protected. However, the Commissioner's refusal to follow these authorities unavoidably raises questions about leaving the final decision on internal matters in the hands of the Commissioner.

Despite the fundamental importance of this case to all members, the DSRRs, who are internally "elected" to represent members, refused to financially assist Cpl. "A" with an application for judicial review before the Federal Court.[17] The case was ultimately settled through an Alternate Dispute Resolution process. The terms of the settlement are sealed, however, the Commissioner's decision remains unchallenged.

The *Cpl. "A"* case is not the only example where the protections offered by statute have apparently been ignored by senior executive of the RCMP. Members in Quebec in the *Gingras* case[18] had to pursue a lengthy and costly legal battle to get the Commissioner to pay a bilingual bonus to eligible members, even though such bonuses were a mandated federal government program. It is clear in the *Gingras* decision that the Commissioner unilaterally arbitrarily and without authority decided not to pay the bilingual bonus to eligible members. The RCMP has now had to retroactively pay millions of dollars in bilingual bonuses with interest.

Even more interestingly, after the *Gingras* decision, senior executive of the RCMP proposed/supported dramatic changes to the existing pieces of legislation governing the Force (without prior consultation with DSRRs), claiming that the Commissioner's authority was somehow fettered by the findings in *Gingras*. The government responded by introducing *Bill C-58*[19] into the House of Commons in November of 1994. Among other things, this *Bill* proposed to remove RCMP members from the statutory protection for occupational health and safety provided by the *Canada Labour Code* (*"CLC"*). No rational explanation has ever been provided on how the issue of bilingual bo-

nuses and occupational health and safety were connected under *Gingras*. In any event, the Commissioner "promised" members that *he would provide* in the form of policy and/or CSOs new occupational health and safety provisions, "equal to or better" than those provided in the *CLC*.[20] However, this promise glosses over a significant point. The *CLC* empowers Labour Canada, a body independent from the RCMP, to make binding orders, review, investigate and lay charges in relation to occupational health and safety violations. In other words, the *CLC* provides an independent statutory regime for compliance, enforcement and prosecution that is not operated by the employer/Commissioner.

Fortunately, in response to *Bill C-58*, neophyte regional RCMP Associations (non-profit organizations that are not part of the DSRRP), with the assistance of the Canadian Police Association, successfully organized a series of responses that identified the apparent discontinuity between the *Gingras* case and the broad statutory amendments supported by RCMP executive. To date, it has never been properly explained how, according to the Commissioner, the *Gingras* case "muddied the waters." In fact, the *Gingras* case, after years of opposition by the RCMP, clarified that the Commissioner cannot act outside his authority or contrary to the law. For many, it is apparent that the senior executive of the RCMP, through *Bill C-58*, engaged in a blatant attempt to consolidate authority in the Commissioner's office, by removing, among other things, one more form of independent, binding oversight of management's actions.

More recently, the method by which the RCMP's Alternate Dispute Resolution system ("ADR") was developed and implemented undermined the credibility of the ERC. The new ADR system was developed in response to a statutorily based internal grievance process that was burdened by bureaucratic obstacles, excessive time delays (*i.e.* it can takes years to address even a minor grievance) and a lack of confidence crisis within the rank-and-file. While the development of an ADR system is commendable, the RCMP retained the services of a company led by the then acting Chair of the ERC to conduct the ADR project.[21] It apparently never occurred to anyone in the decision-making process that having a contract with the RCMP and holding a quasi-judicial position as the acting Chair of the ERC may create actual or perceived issues of bias for members. In addition, an RCMP association from Quebec requested an investigation of the Chair of the RCMP Pay Council (a recently formed and internally funded in-house body that makes recommendations, which are not necessarily disclosed to members, to the Commissioner on pay and benefits) on the basis of reliable information that the Chair "has officially taken sides against the formation of a union, and collective bargaining rights within the RCMP..."[22]

Even more disturbing is a recent internal discipline case dealing with regulation 57 of the *RCMP Regulations*, which prohibits members of the force from holding public office or engaging in any political activity. S/Sgt. Delisle (a well known RCMP union activist), was subject to *suspension without pay* for a period of 1.5 years for being elected the unpaid mayor of a village near Montreal, which is not policed by the RCMP. Delisle has also been a DSRR for the past 17 years. Prior to the election, he notified the Commanding Officer of Quebec that he was running for election, and was given permission to run (at the same time, a Commissioned Officer held an elected position as a town councillor in a small town close to Ottawa, and more than one member in Alberta held an elected position[23]).

Only days prior to the election, Delisle was ordered to withdraw as a candidate. He refused and was immediately suspended. At the time of suspension, Delisle attempted to file a grieveance. The Commanding Officer refused to accept the grievance, claiming that it was not a grievable decision. The suspension of S/Sgt. Delisle without pay was in blatant violation of RCMP policy and the Commissioner's publicly stated position on when a member will be suspended without pay; *i.e.* a) imprisonment, b) reprehensible conduct, c) reasonable and probable grounds to believe member has committed a criminal offence, d) absent without authority, and e) refused/failed to report for duty.[24] S/St. Delisle eventually appeared before the Arbitration Board of Human Resources Development Canada (*i.e.* unemployment insurance), which found that "...the real motive for the suspension is more the fact that Mr. Delisle wanted to establish an RCMPolice officers assocation than the fact he was running for mayor."[25] Delisle's only form of redress was to engage in a Federal Court action. He has subsequently been reinstated, all backwages have been paid to him, and he continues with a civil lawsuit against the RCMP for $640,000.00 to cover his legal costs, as well as specified, general and punitive damages.

In the last few weeks, regulation 57 has been struck down by the Quebec Superior Court as excessive in its restrictions on members rights.[26] This is not surprising since this same conclusion was reached more than a year ago by a parliamentary committee which specifically reviews regulations. Despite communicating the committee's findings to the Commissioner regarding regulation 57, the RCMP still considered it necessary to fight Delisle's case before the Quebec courts.

Similarly disturbing is the occasion when S/Sgt. Delisle, as a DSRR, was expelled from DSRR caucus meetings because the other DSRRs disagreed with his position on unionization. S/Sgt. Delisle ultimately obtained an interim injunction from the Federal Court.[27] Unable to silence S/Sgt. Delisle, the response of the Commissioner was to enact CSOs prohibiting DSRRs from engaging in "activities that promote alternate programs in conflict with the non-union status of the DSRRP."[28] It was not long before two DSRRs from British Columbia filed a complaint against S/Sgt. Delisle after he attended the inaugral meeting of a British Columbia RCMP association, alleging that he was supporting another form of employee representation contrary to the CSOs.[29] Clearly, open communication, freedom of ex-

pression, opinion and association and other democratic principles are not deeply rooted in the DSRRP or the RCMP.

It is apparent that even in the face of unambiguous jurisprudence, the Commissioner is often intransigent in recognizing the rights of RCMP members in relation to internal matters. The apparently cavalier disregard for the interests of members demonstrated by the *Cpl. "A"* case, *Gingras* case (and its aftermath), the *Delisle* cases and the inherent limitations of the DSRRP and ERC process, amply demonstrate the precarious, inequitable and one-sided nature of labour relations in the RCMP.

The Road to Full Employee Rights

Despite the fact that the current statutory framework governing the RCMP does not allow or expressly excludes RCMP members from forming an employee association, several non-profit associations have been formed in an attempt to provide an alternative means to deal with issues affecting RCMP members. There is no question that the current Liberal Government (and RCMP executive) are adamantly opposed to any notion of collective bargaining in the RCMP. This is so even in the face of the recent recommendations of the federal government's own task force on labour issues that unionization be permitted in the RCMP.[30] The Sims Task Force received submissions from four regional RCMP associations, the Canadian Police Association and the Ontario Provincial Police Association and observed that:

> Submissions [of the above-noted associations]... requested that Part 1 of the Code cover the R.C.M.P. so that its members could engage in collective bargaining. They did not seek the right to strike, accepting arbitration as the appropriate dispute resolution mechanism.... Much of the R.C.M.P.'s modern-day activities consist of contract policing for eight provinces and approximately 200 Municipalities. To a great extent, the duties and responsibilities of the R.C.M .P. and their provincial counterparts are indistinguishable ... *Members of a police force could be granted access to collective bargaining without denying the need for operational control and without jeopardizing the public interest.*[31] (Emphasis added)

The government rejected any consideration of such a move. As a result, it appears that members will once again have to take the judicial road to secure some leadership and binding external direction on internal matters.

This trip had already been started. On November 28, 1989, the Quebec Superior Court rejected S/Sgt. Delisle's legal challenge that the provisions preventing RCMP members from forming a union are invalid. The decision of the Superior Court was appealed by Delisle to the Quebec Court of Appeal, and that appeal was dismissed January 29, 1997. In a strong dissent, Baudouin J.A. observed:

> Legislature has implemented, as a substitute [for collective bargaining] a system of internal representation, which has no real power in actual practice, as management exercises absolute and unquestionable authority over the members. The situation therefore represents a notable exception to the fundamental freedom universally recognized in all free and democratic societies to unionize and hence be able to negotiate one's working conditions without hindrance. .... Indeed, at the present time the only group structure that they may have [DSRRs] is the one imposed by law, a structure that is emptied of all effective power and, in the final analysis, wholly governed by management.[32]

This case has been appealed to the Supreme Court of Canada and will be argued in the fall of 1998.[33]

The factum filed on behalf of Delisle asserts four basic constitutional arguments in support of striking down the provisions that deny members the right to collectively bargain. Delisle argues that his/members' *Charter* rights of 1) freedom of association, 2) freedom of expression, 3) right to equality have been breached, and 4) that the impugned provisions are not reasonable limits prescribed by law as demonstrably justified in a free and democratic society.

First, Delisle argues that the impugned legislative provisions deny him the fundamental right to form a union of his choosing and thus violates his very basic right to freedom of association.[34] The argument surrounding freedom of association deals with Delisle's forced obligation to participate in an employer-dominated system (*i.e.* the DSSRP) which, aside from muzzling dissent, stifles his right to associate freely and institutionalizes the employer's absolute dominance. In effect, the government has legislated an "unfair labour practice" by exempting itself from the laws which all other employers must comply with. The DSRRP and related statutory provisions prevent members from holding a free vote about whether they wish to participate in this system.

Second, it is Delisle's submission that the impugned provisions deny him the fundamental right to express himself either a) by voting on whether or not he wants a union, b) through the actual formation of a union of his own choosing, or c) ultimately in expressing his solidarity with other members of the RCMP [35]. Delisle submits that it is self-evident that "the right to associate is essential to securing an effective employee voice, [and] the denial of that right has the effect of denying freedom of expression since access to that effective employee voice is refused."[36]

Third, Delisle argues that the impugned legislative provisions deny his right to equality under s. 15 of the *Charter*.[37] It is Delisle's submission that his status and obligations as police officer extend beyond the workplace, and in effect, have become a personal characteristic. Further, RCMP members are isolated and insular, and based on past and current denials of fundamental rights by the RCMP (examples are detailed in the factum) they are a vulnerable group in need of protection.[38]

Last, Delisle submits that the infringement of his constitutional rights

is not justified under s. 1 of the *Charter* because 1) the objective of preventing a union in the RCMP does not respond to any "pressing or substantial concern" in a democratic society; rather it perpetuates a power imbalance wherein the Commissioner has absolute power and control over members' rights; 2) should the objective of preventing a union in the RCMP respond to pressing concerns that the RCMP could become subject to an illegal work stoppage (an argument Delisle and every other police association does not concede), no "rational connection" has been demonstrated between the absolute denial of the right to form a union, or even to express oneself on this point, and the requirement for uninterrupted law enforcement service; 3) a proper balance has not been struck between the rights of freedom of association and expression and the right to equality under the law and the absolute prohibition to unionize and the absolute power of the RCMP Commissioner; and 4) there is no "proportionality" between the deleterious effects of the prohition or absolute denial of the right to form a union and the objective of uninterrupted police services.[39]

At bottom, the government/ RCMP's alleged basis for denying the right to form a union is the *apprehension* of the *potential* for a *possible* interruption of police service in the event of a *potential* unresolved labour dispute and the *perception* of a *potential* conflict of loyalty. As Delisle notes, among other things, a) it has never been established that such an occurrence is likely (rather the facts indicate the opposite), b) the evidence indicates that RCMP members are loyal and law abiding, c) the loyalty argument is based on the premise that RCMP members are unable to appreciate the difference between their rights as employees and their professional responsibilities, which is "patronizing", "insulting" and unsupported by evidence, d) numerous other emergency services occupations are permitted to unionize, e) the right to strike is not sought by RCMP members and/or other alternatives exist to prevent interruption of services (*e.g.* arbitration), and f) providing basic rights to members is more conducive to civil order and respect for the law than denying rights enjoyed by other employees.

Conclusion

Given the RCMP labour relations record provided in this paper, and the disposition of the Supreme Court of Canada with regard to basic constitutional rights, there is every possibility that the legislative provisions at issue will be found unconstitutional. Should that happen, RCMP members will at least enjoy the right to choose whether or not they want to collectively bargain and have independent employee representation. Even if the DSRRP initially survives, having the right to dispose of that program and adopt a new employee relations process whenever the members choose is a very powerful vehicle to ensure management truly deals with employee issues on a level playing field. However, given the Commissioner's purported commitment to empowerment, consultation, and the RCMP's stated mission, vision and values, it should not require direction from a court to bring RCMP labour relations into the 20th century, as it prepares to exit for the new millennium.

Endnotes:

1. For an excellent early history of the RCMP, see R.C. MacLeod, *The NWMP and Law Enforcement, 1873-1905* (Toronto: Univ. of Toronto Press, 1976).
2. Jack Ramsey, "My Case Against the RCMP" (July 1972) *MacLean's* at 19-34.
3. See, Gary E. Reed, *Organizational Change In The RCMP: A Longitudinal Study* (unpublished M.A. thesis, S.F.U., Political Science, 1984) and Fred Hardy, "The R.C.M.P. Staff Relations Program" (Winter 1978), *British Columbia Police Journal* 8.
4. See s. 96 of the *Royal Canadian Mounted Police Regulations, 1988* (SOR/88-361) as amended and the *Commissioner's Standing Orders (Division Staff Relations Representative Program)*, not published, signed 9 June 1993.
5. Lindsey Kines, "Raises for RCMP face final hurdle" (20 March 1998) *The Vancouver Sun* A1-2.
6. Canada (Chairman: Rene Marin), *Report of the Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure Within the Royal Canadian Mounted Police* (Ottawa: Information Canada, 1976) at 3 ("Marin Commission").
7. *Supra*, Reed, note 3 and *ibid* at 193.
8. Craig S. MacMillan, "Member Beware: The Case for Binding External Review of RCMP Internal Matters" (1998) 4:1 *Action* 5 at 7.
9. See ERC File No. 2400-95-006.
10. *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, as amended.
11. See, ERC File No. 2200-90-005 (D-16) cited also as 3 A.D. (2d) 168 at 189.
12. *Supra*, note 9.
13. (Unreported), 1 Sept. 1994 (Cornwall).
14. (1989), 96 N.B.R. (2d) 412.
15. (1992), 74 B.C.L.R. (2d) 184.
16. See, Rene J. Marin, *Reference: Section 40 RCMP Act Ordered Statements* (1996) ("Marin Report") and A/Commr. D.G. Cleveland, Director of Personnel, File G117-15-29, correspondence dated Feb 17, 1997.
17. *Rae v. JPR Murray and/or C. Allen in his capacity as Commissioner of the RCMP*, Van. Fed. Ct. Reg. No. T-2684-967.
18. *Gingras v. Canada* (1994), 165 N.R. 101 (Fed. C.A.).
19. *An Act to amend the Public Service Staff Relations Act and the Royal Canadian Mounted Police Act.*
20. Commissioner's Broadcast, "Bill C-58" (19 Jan. 1995) at 5.
21. Rebecca Johnson, "ADR Goes National" (May 1996), *Pony Express* at 12.
22. Pierre Vincent, "The RCMP Associations Request the Dismissal of Mr. Paul Lordon" (1998), 4:1 *Action* 1.
23. *Delisle v. A.G. Canada* (2 Sept. 98) Montreal Reg. 500-05-028290-979 (Que. S.C.)
24. See, RCMP Admin. Man. XII.5.d.3. and "C" Division Bulletin on Staff Relations within the RCMP, "Suspension Without Pay" (Sept. 1996), *Contrepoids* 1-3.
25. *Ibid* (unofficial translation); see also, Canadian Press, "Mountie-made-mayor disputes reason behind suspension from force" (10 Nov. 1995) *Vancouver Sun.*
26. *Supra*, note 23
27. *Delisle v. RCMP Commissioner et al.* (1991), 39 F.T.R. 217 (T.D.).
28. *Supra*, note 4.
29. "C" Division Members' Association, "Readers Coroner - Complaint Regarding Alleged Violation of Commissioner's Standing Orders (1995), *Les Affaires De 'Association La Division "C"* at 2.
30. Canada (Andrew Sims, Chair), *Seeking A Balance: Review of Part 1 of the Canada Labour Code* (Canada: Min. Of Public Works and Government Services, 1995) ("Sims Task Force").
31. *Ibid* at 49-50.
32. *Delisle v. Deputy Attorney General of Canada, Solicitor General of Canad and the Commissioner of the RCMP* (29 Jan. 1997) Montreal Reg. 500-09-001747-898 at 2 and 6.
33. *Gaetan Delisle v. Attorney General of Canada*, S.C.C. Reg. No. 25926.
34. *Ibid.*
35. *Ibid.* Appellant's Factum at 9.
36. *Ibid.* at 22.
37. *Ibid.*
38. *Ibid.* at 30.
39. *Ibid.* at 10.