POLICE POWERS AND DRUG-RELATED OFFENCES

PREPARED FOR THE SENATE SPECIAL COMMITTEE ON ILLEGAL DRUGS

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ABSTRACT

The goal of this paper is to provide a general overview of the law regarding police powers in Canada, with an emphasis on those relating to the enforcement of illicit drug legislation. It is clear that the police require powers for the maintenance of law and order in our society. Also evident is that these powers must be constrained to protect individuals from excessive police activity.

Drawing the line on appropriate police conduct requires the weighing of conflicting interests. First, there are the individual's interests, including that of being free from state intrusion. Second, there are the state's interests, including protecting society from crime.

Parliament and the courts have long recognized that, with respect to drug-related and other consensual type offences, routine investigative techniques are often insufficient because of the difficulty in detecting these activities. Both appear to agree that additional police powers may be warranted in these circumstances.

Arrest and Detention

The *Criminal Code* sets out when police may arrest a suspect. Generally, the police are required to have reasonable and probable grounds to believe that a person has committed an offence. Certain of the rights guaranteed by the *Canadian Charter of Rights and Freedoms* apply when a person is detained or arrested. The police must ensure that a person is not detained arbitrarily. In addition, the Charter guarantees that everyone who is arrested or detained has: the right to be informed of the right to counsel; and the right to retain and instruct counsel without delay. Thus, the accused must be informed of the right and, in addition, be allowed to exercise that right. The right to counsel has been zealously guarded by the courts, and police conduct that breaches this right will be found to be unacceptable.

Interrogation

A police officer is authorized to question individuals in the course of his or her duties. There is no corresponding obligation, however, for a person to respond to these questions. The general rule regarding the admissibility of statements made by an accused is that the Crown will have to prove that any statement made was made voluntarily and was the product of a conscious operating mind. Generally, threats and promises should not be made to induce a statement. In addition, interrogation in oppressive circumstances may lead to the statement being inadmissible. Finally, with respect to police trickery, if the conduct would shock the community, the statement may be inadmissible. The general test is that a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to its voluntariness. One must determine whether police actions individually, and cumulatively, improperly induced a confession. This analysis must be a contextual one.

Search and Seizure

Police have both statutory and common law powers to conduct searches. With respect to drug-related offences, the *Controlled Drugs and Substances Act* establishes a comprehensive search and seizure scheme. Although these provisions are similar to the search and seizure provisions of the *Criminal Code*, police have some additional powers under the illicit drug legislation. For example, the legislation authorizes police who are in the process of executing a search warrant to search a person found at the locale for illicit drugs if certain conditions are satisfied. Generally, police are only allowed to search a person when it is incidental to lawful arrest. As in the *Criminal Code*, the legislation authorizes warrantless searches in exigent circumstances.

Section 8 of the Charter provides that everyone has the right to be secure against unreasonable search and seizure. Court decisions have dealt with the question of whether searches are reasonable in various situations and the ancillary question of whether evidence obtained during the searches can be adduced at trial. A search will generally be reasonable if it is authorized by law, the law itself is reasonable, and the search is carried out in a reasonable manner.

Section 8 protects the public's reasonable expectation of privacy from state intrusions. Thus, where there is no reasonable expectation of privacy, section 8 does not apply. In addition, a diminished expectation of privacy (for example, in prisons or at border crossings)

will lower the standard of reasonableness (for example, excusing the absence of a warrant or reducing the standard required for justifying the search). A person's home is where there would be the greatest expectation of privacy and thus a greater degree of constitutional protection.

There is a presumption that a warrantless search is unreasonable. The general rule for a valid search is that the police will require prior authorization to conduct the search (for example, by obtaining a search warrant) and reasonable and probable grounds that justify it. This is to provide a safeguard against unjustified state intrusion. It is recognized, however, that prior authorization is not always feasible, although this should generally be limited to situations in which exigent circumstances render obtaining a warrant impractical.

Searches conducted at the border by customs officers are an example of reduced constitutional protections where the courts find that there is a diminished expectation of privacy based on the context. For example, in the case of border searches, it is not necessary to obtain prior authorization.

Generally, federal criminal law does not provide authorization for a search of the person. The common law does, however, allow a search of the person incidental to a lawful arrest. This common law power is an exception to the general rule that a search requires prior authorization to be reasonable. A person may only be searched for the purpose of locating further evidence relating to the charge upon which he or she has been arrested or to locate a weapon or some article which may assist him or her to escape or commit violence. Although the power to search incidental to an arrest is fairly broad, there is no automatic unrestricted right to search incidental to an arrest.

Courts have shown a willingness to scrutinize the manner in which a search of the person is conducted. The intrusiveness of a search can vary and courts have stated that the more intrusive the search, the greater must be the justification and greater the constitutional protection. Thus, although a frisk search will generally be acceptable, more intrusive searches such as strip searches would seem to require greater justification.

Because of the consensual nature of drug offences, police often resort to special investigative techniques to detect these crimes, including the use of electronic surveillance. The Supreme Court of Canada has stated that electronic surveillance constitutes a search for the purposes of section 8 of the Charter, and its decisions in this area have had a significant impact on the *Criminal Code* provisions dealing with such techniques. Because electronic surveillance is

more invasive of privacy than regular search warrants, more procedural safeguards are provided in the legislation.

Exclusion of Evidence

The rules regarding the exclusion of evidence have changed since the adoption of the Charter. The test is whether the admission of the evidence would bring the administration of justice into disrepute in the eyes of the reasonable person, dispassionate and fully apprised of the circumstances of the case. The three primary factors to be considered are: (a) does the admission of the evidence affect the fairness of the trial; (b) how serious was the Charter breach; and (c) what would be the effect on the system's repute of excluding the evidence. The decision of whether the evidence should be excluded can be important; if courts are reluctant to exclude evidence, they may be sending conflicting messages to the police. Although their conduct will have been found to breach a person's Charter rights, there may be little incentive for the police to adhere to the limits imposed by the courts if the evidence is not excluded.

Entrapment and Illegal Police Activity

Entrapment and illegal police activity are both based on the doctrine of abuse of process. Such tactics are used in the case of drug-related offences because of the consensual nature of the offence.

Entrapment will occur in one of two circumstances: (1) the police provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry; or (2) having a reasonable suspicion or acting in the course of a *bona fide* inquiry, the police go beyond providing an opportunity and induce the commission of an offence. The Supreme Court of Canada has established a non-exhaustive list of factors that a court must assess in determining whether the police conduct goes further than providing an opportunity. The court must adopt a contextual approach, and the doctrine will apply only in the "clearest of cases." If the accused succeeds in proving there was entrapment, the remedy is a stay of proceedings.

The use of illegal police activity to combat crime raises the issue of whether such conduct leads to an abuse of process such that a stay of proceedings will be granted. The Supreme Court of Canada has stated that illegal police activity does not automatically amount to

an abuse of process. The legality of police actions is but a factor to be considered, "albeit an important one." Although the issue of illegal police activity is important, it has less of an impact on the enforcement of drug legislation. The reason is that the drug legislation provides police immunity for activities such as buy-and-bust operations and reverse sting operations.

Conclusion

Clearly, Parliament and the courts have recognized that as criminals become more sophisticated, the police must be given more sophisticated tools to fight their crimes. With respect to drug offences (and other consensual offences), additional tools may be required because of the difficulty in detecting these crimes and enforcing the law.

Although the illicit drug trade is considered very serious, the police are not given "carte blanche" to do what they please to solve a crime. The courts closely scrutinize police activity to ensure that their conduct does not shock the community and in any way affect the fairness of an accused's trial.

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INTRODUCTION

This paper provides an introduction to police powers in Canada and attempts to indicate where there may be specific powers in relation to enforcing illicit drug legislation. Although illicit drugs are referred to as "controlled drugs and substances" in Canadian drug legislation, this paper uses the terms "illicit drugs" or simply "drugs." In addition, the term "police" generally refers to the RCMP, as well as provincial and municipal police forces, even though the term "peace officer" in the *Criminal Code*(1) (the *Code*) includes other law enforcement officials who are not part of these regular police forces. In many cases, the powers and duties discussed would also apply to these other law enforcement officials. Some reference is made to the specific powers of customs officers because of their role in controlling the entry of illicit drugs into Canada.

It is clear that the police require powers for the maintenance of law and order in our society. In investigating criminal offences, the police may use less intrusive investigative techniques such as observation and interrogation. In other cases, they may be required to use more intrusive methods such as electronic surveillance and reverse sting operations. As will be seen in this paper, some of these more intrusive investigative techniques are used mainly to combat drug-related offences.

Also evident is that these powers must be constrained so as to protect individuals from excessive police activity. As stated by La Forest J.: "The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state."(2) Even before the *Canadian Charter of Rights and Freedoms* (the Charter) was enacted, the courts played a role in controlling police powers. It is clear that the arrival of the Charter and the individual rights and

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(1) R.S.C. 1985, c. C-46.

(2) *R*. v. *Dyment*, (1988) 45 C.C.C. (3d) 244 at p. 254 (S.C.C.).

freedoms that it protects has allowed the courts to play an even greater role in defining permissible boundaries of police conduct. In determining whether police conduct is acceptable, one is generally forced to weigh conflicting interests. First, there are the individual's interests, including the interest of being free from state intrusion. Second, there are the state's interests, including protecting society from crime. Because these interests generally conflict, it can sometimes be difficult to agree on where the line should be drawn in relation to police conduct.

Over the years, common law has defined many of the powers and duties of police officers. In addition, they have been set out in legislation which supersedes the common law. Thus, it "is only when he exercises those powers conferred by statute or derived from the common law that it can be said that the officer is acting in the 'lawful execution of his duty.' "[3]

The courts have recognized that as crimes become more sophisticated, police must be able to use more sophisticated investigative techniques to detect their commission. In addition, with respect to drug-related offences and other consensual type offences,[4] it is acknowledged that routine investigative techniques are often insufficient because of the difficulty in detecting these activities. Generally, because there is no "victim," no one is there to complain or report the offence to police. Both Parliament and the courts appear to agree that additional police powers may be warranted in these circumstances. It is believed that police need to be proactive rather than reactive as is generally the case for other non-consensual offences. An example of this viewpoint is the following statement by former Chief Justice Laskin of the Supreme Court of Canada:

> Methods of detection of offences and of suspected offences and offenders necessarily differ according to the class of crime. Where, for example, violence or breaking, entering and theft are concerned, there will generally be external evidence of an offence upon which the police can act in tracking down the offenders; the victim or his family or the property owner, as the case may be, may be expected to call in the police and provide some clues for the police to pursue. When "consensual" crimes are committed, involving willing persons, as is the case in prostitution, illegal gambling and drug offences, ordinary methods of detection will not generally do. The participants, be they deemed victims or not, do not usually complain or seek police aid; this is what they wish to avoid. The police, if they are to respond to the

(3) Roger E. Salhany, *The Police Manual of Arrest, Seizure and Interrogation*, Carswell, 1997, p. 17.

(4) Other consensual offences include gambling and prostitution.

> public disapprobation of such offences as reflected in existing law, must take some initiatives.(5)

In addition, the Alberta Court of Appeal stated the following:

> Police involve themselves in high-speed chases, travelling beyond posted speed limits. Police pose as prostitutes and communicate for that purpose in order to gather evidence. Police buy, possess and transport illegal drugs on a daily basis during undercover operations. In a perfect world this would not be necessary, but patently illegal drug commerce is neither successfully investigated, nor resisted, by uniformed police peering through hotel room transoms and keyholes or waiting patiently at police headquarters to receive confessions of penitent drug-traffickers.(6)

Thus, it appears that courts may be more willing to accept extraordinary investigative techniques in relation to drug-related offences as opposed to other non-consensual offences. In addition, Parliament has, in certain circumstances, provided special police powers in relation to drug-related offences so as to better combat these offences.

This recognition of the particular nature of drug offences is not new. The Le Dain Commission stated the following:

> The peculiar nature of drug crimes – the fact that the people involved in them are consenting and co-operative parties, and there is rarely, if ever, a victim who has reason to complain, as in crimes against persons and property – makes enforcement of the drug laws very difficult. The police are rarely assisted by complainants. For the most part they have to make their own cases. Moreover, the activity involved in non-medical drug use is relatively easy to conceal. It can be carried on, by agreement of the parties involved, in places which are not easily observed by the police. Further, the substances and equipment involved are relatively easy to conceal or dispose of.
>
> All of these difficulties have given rise to the development of unusual methods of enforcement.(7)

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(5) *R*. v. *Kirzner* (1977) 38 C.C.C. (2d) 131 (S.C.C.) at p. 135.

(6) *R*. v. *Bond* (1993) 135 A.R. 329 (C.A.) at p. 333.

(7) Commission of Inquiry into the Non-medical Use of Drugs, *Cannabis*, A Report, Ottawa 1972, p. 239.

The following sections of the paper will review police powers used to investigate offences in general, with an attempt to highlight special rules that may apply in relation to drug-related offences. This will include a discussion of:

- the powers of arrest and detention;
- the powers to interrogate suspects;
- the powers of search and seizure (including the use of wiretaps); and
- the use of entrapment and illegal police conduct to combat crime.

In all cases, the limits imposed on these powers are discussed. The rules regarding the exclusion of evidence under the Charter are also briefly reviewed. Although these rules do not directly define the permissible boundaries of police conduct, they may have an indirect impact on it. This paper deals with fairly complex and technical legal issues, and it provides the reader with a better understanding of police powers and the limits imposed on them. The goal of this paper is not to provide an exhaustive analysis/review of the law but rather a general overview of it.

ARREST AND DETENTION[8]

Whether a person has been detained or arrested depends on the facts in question. A detention indicates some form of restraint upon a person's liberty. It requires some element of compulsion or coercion, whether a physical or psychological restraint (for example, where the person reasonably believes they did not have a choice as to whether to comply with the demand or direction). In *R.* v. *Feeney*,[9] the Supreme Court of Canada stated that a detention occurs when a police officer assumes control over the movement of a person by a demand or direction. An arrest, meanwhile, "may occur where words are used which clearly indicate to the person that if he attempts to leave, he will be physically restrained and the person does in fact submit to his loss of liberty."[10] Given that there do not appear to be any significant special rules regarding

(8) The author wishes to acknowledge the work of Marilyn Pilon entitled *Search, Seizure, Arrest and Detention under the Charter*, Current Issue Review, 91-7E, Parliamentary Research Branch, Library of Parliament, revised 15 February 2000. Sections of that paper have been reproduced in this document.

(9) (1997) 115 C.C.C (3d) 129 (S.C.C.).

(10) Salhany, *The Police Manual of Arrest, Seizure and Interrogation*, *supra*, note 3 at p. 26.

arrest and detention in relation to drug-related offences, this section of the paper will be brief and describes the law as it applies to all offences.

A. Powers of Arrest

The *Code* provides two procedures to compel a person to appear before a court: the issuance of a summons or appearance notice; and by arrest with or without warrant. A police officer who has reasonable grounds to believe that a person has committed an offence may lay an information, and a justice who is satisfied that the case has been made will issue either an arrest warrant or a summons directing the accused to appear. A summons is to be issued unless it is necessary in the public interest to issue a warrant. As will be discussed below, a police officer may also, in certain circumstances, arrest a person without a warrant. If the officer does not arrest the person, he or she may issue an appearance notice and then proceed to lay an information at which time the justice will confirm or cancel the appearance notice. Even when a person is arrested, either with or without a warrant, they will generally not be detained until trial unless it involves a serious offence or there is a risk of flight. Depending on the circumstances, the arrested person may be released by the officer, by an officer in charge or by a justice. In the case of a judicial interim release, the onus is usually on the Crown to show why the detention is justified. This onus is reversed in certain cases, however, including where a person is charged with a trafficking, importing or exporting, or production offence under the *Controlled Drugs and Substances Act* (the *CDSA*) where the offence is punishable by imprisonment for life.

1. Arrest with Warrant

A police officer to whom a warrant is directed has the authority to arrest the accused in the province where it was issued or – in the case of "fresh pursuit" – anywhere in Canada. There are also procedures that allow the execution of a warrant in another province.

2. Arrest without Warrant

Section 494 of the *Code* sets out the powers of any person, including a police officer, to arrest without a warrant, while section 495 sets out the powers to arrest without a warrant that are applicable only to police officers. Thus, a police officer has all of the powers of

arrest of a private citizen (section 494) as well as additional powers available only to police officers (section 495).

Subsection 494(1)(a) provides that a person is authorized to arrest without warrant a person he or she finds committing an indictable offence.(11) Subsection 494(1)(b), meanwhile, provides that a person is authorized to arrest without warrant a person who, on reasonable grounds, he or she believes has committed a criminal offence and is escaping from and freshly pursued by persons who have lawful authority to arrest that person.(12) What are reasonable grounds?

> …it means that suspicious circumstances or intuition will not be enough. To constitute reasonable grounds, there must be some "credibly-based probability" or, in other words, some factual basis for the belief. This means that the person who arrests must be able to give the court reasons for his actions, i.e., a tip from a reliable source or something he observed. He must be able to subjectively support his belief that the person has committed a criminal offence. Moreover, those facts must be such as would cause a reasonable person placed in the position of the arresting person to believe, or to have a strong and honest belief, that the person had probably committed an offence. But it need not go so far as to amount to a *prima facie* case for conviction.(13)

The degree of reasonableness may vary according to the context. Thus, the reasonableness standard required for warrantless arrests may be lower than the reasonableness that will be required for a search warrant. The Ontario Court of Appeal stated the following:

> Both a justice and an arresting officer must assess the reasonableness of the information available to them before acting. It does not follow, however, that information which would not meet the reasonableness standard on an application for a search warrant will also fail to meet that standard in the context of an arrest. In determining whether the reasonableness standard is met, the nature of the power exercised and the context within which it is exercised must be considered. The dynamics at play in an arrest situation are very different than those

(11) Pursuant to paragraph 34(1)(a) of the *Interpretation Act*, hybrid offences are deemed to be indictable offences. Hybrid offences are offences where the Crown has the option of proceeding by indictment or by summary conviction.

(12) A criminal offence is any indictable offence or summary conviction offence under the *Code* or other federal statute.

(13) Salhany, *The Police Manual of Arrest, Seizure and Interrogation*, *supra*, note 3 at p. 61.

> which operate on an application for a search warrant. Often, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. The law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant.(14)

In addition to the powers of arrest of a private citizen, subsection 495(1)(a) authorizes a police officer to arrest without warrant a person who has committed an indictable offence. This power is broader than the one for private citizens because there is no requirement to "find" the person committing the offence. Pursuant to subsection 495(1)(a), the police officer may arrest without warrant a person who, on reasonable grounds, he or she believes has committed an indictable offence. What constitutes reasonable grounds is discussed above. Finally, subsection 495(1)(a) authorizes a police officer to arrest without warrant a person who, on reasonable grounds, he or she believes is about to commit an indictable offence. In this case, the police officer may arrest the person even if no attempt has been made to commit an indictable offence. "The difficulty with an arrest under this section is that, although it authorizes a peace officer to carry out an arrest, the officer cannot hold the accused because he has not committed any offence. What he should do is detain the person until he is satisfied that the probability of his committing the indictable offence no longer exists."(15)

Subsection 495(1)(b) authorizes a police officer to arrest without warrant a person he or she finds committing a criminal offence. In these circumstances, the officer is not limited to indictable offences but must "find" the person committing the offence. Finally, subsection 495(1)(c) authorizes a police officer to arrest without warrant a person in respect of whom he or she has reasonable grounds to believe that a warrant of arrest or committal is in force within the territorial jurisdiction in which the person is found. The *Code* also sets out other more specific powers of arrest.(16)

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(14) *R.* v. *Golub* (1997) 9 C.R. (5th) 98 (Ont. C.A.) at p. 107.

(15) *Ibid.*, at p. 64.

(16) For example, see *Code* subsections 494(2) and 199(2).

Subsection 495(2) places limitations on the powers to arrest without warrant with respect to certain offences.[17] In these cases, a police officer is not to arrest a person without a warrant where the public interest (the need to establish identity, preserve evidence, or prevent the continuation or repetition of the offence or commission of another offence) may be satisfied without arresting the person and there are no reasonable grounds to believe that the person will not appear in court as required. If the police officer does not arrest the person, he or she has the following options:

> …he may at the time prepare and serve the accused with an appearance notice, or he may attend before a justice of the peace and lay an information charging the accused with the offence. Where he does the latter, he can then apply to the justice of the peace for a summons or a warrant to compel the accused to appear in court at a specified time and place to answer to the charge.[18]

For offences not listed in section 495(2), the police officer can proceed with an arrest. The *Code* sets out the duties of a police officer and an officer in charge once an arrest is made. For example, it sets out when a person should or should not be released from custody.

The Charter, as its name suggests, guarantees certain rights and freedoms. Some of these rights apply once a person is detained or arrested by the police.

B. Arbitrary Detention

Section 9 of the Charter states:

> 9. Everyone has the right not to be arbitrarily detained or imprisoned.

Standards by which the "arbitrariness" in section 9 can be measured are fast being established with successive decisions by the Supreme Court of Canada. Thus, it is arbitrary and offensive for the police, with little or no reason, to detain or arrest a person for questioning or for further investigation. However, detention for investigative purposes may be justified if the police

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(17) These offences are: an indictable offence within the absolute jurisdiction of a provincial court judge; a hybrid offence; and an offence punishable on summary conviction.

(18) Salhany, *The Police Manual of Arrest, Seizure and Interrogation*, *supra*, note 3 at p. 68.

officer has "articulable cause" for the detention.[19] It is not improper for them to pursue their investigation following an arrest made on the basis of their reasonable and probable belief that the accused was committing or had committed an offence. In *R.* v. *Storrey*,[20] the Court said that to make an arrest, the police require nothing more than reasonable and probable grounds. They do not have "to establish a *prima facie* case for conviction before making the arrest."

C. Right to Retain Counsel

Section 10 of the Charter states:

> 10. Everyone has the right on arrest or detention
> (a) to be informed promptly of the reasons therefor;
> (b) to retain and instruct counsel without delay and to be informed of that right; and
> (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

The right described in section 10(b) is of crucial importance to a person who has been arrested or detained. It guarantees that everyone who is arrested or detained has: the right to be informed of the right to counsel; and the right to retain and instruct counsel without delay. Thus, the accused must be informed of the right and, in addition, be allowed to exercise that right. This right applies equally to all offences, including those that are drug-related. The following will provide a brief overview of some of the caselaw in relation to the right to counsel.

In *R.* v. *Kelly*,[21] the Ontario Court of Appeal drew a distinction between the interests protected by paragraphs (a) and (b) of section 10. With respect to paragraph (a), the Court held that a person is not obliged to submit to an arrest without knowing the reason for it; accordingly, it is essential that the person be informed "promptly" of the reason. On the other hand, the purpose of paragraph (b) is to protect someone from prejudicing his or her legal position by

(19) *R.* v. *Simpson*, (1993) 79 C.C.C. (3d) 482 (Ont. C.A.).

(20) (1990) 53 C.C.C. (3d) 316.

(21) (1985) 17 C.C.C. (3d) 419 (Ont. CA.).

saying or doing something without the benefit of legal advice. The requirement that the accused be informed "promptly" of the reason for the arrest means that the information must be given "immediately." However, the requirement that the accused be informed of the right to counsel "without delay" is not the same as requiring that the accused be informed "immediately." There may be good reason for an arrested person to be informed "without delay" of the right to counsel, but there is no essential reason why that must be part and parcel of the statement under paragraph (a) of the reason for the arrest; such a statement is really part of the arresting process itself.

In *R.* v. *Ironchild*,[22] it was held that where an accused is asked whether he or she wishes counsel and gives an ambiguous reply and expresses only a vague desire to consult a lawyer, it is proper for the police to repeat the question without doing anything further. In the majority of similar cases, however, the courts have held that this right requires that the accused be given a real opportunity to retain counsel. In *R.* v. *Nelson*,[23] it was stated

> there should not be a mere incantation of a 'potted version' of the right followed by conduct on the part of the police which presumed a waiver of the right. The thrust of this provision is the guarantee of information so that an early opportunity to make a reasoned choice is available to the accused. The purpose of making the accused aware of his right is that he may decide, and that means he should have a fair opportunity to consider whether he wishes to resort to his right.

In *R.* v. *Evans*,[24] the Supreme Court of Canada considered the extent to which arrested people must understand the police statement of their rights and when the police must reiterate the statement. When the accused in this case, who had an I.Q. of between 60 and 80, was informed of his rights and asked whether he understood them, he replied that he did not. Nevertheless, the police, who were aware of his diminished mental capacity, took him to the station and conducted interviews that eventually led to his confessions to two murders. The Court held that this was a violation of the accused's right to counsel, and that the evidence of the confessions must be excluded under section 24(2) of the Charter.

In overturning the conviction and acquitting the accused, the Court categorically rejected the Appeal Court's claim that the administration of justice would fall into disrepute if a

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(22) Can. Charter of Rights Ann. 15-13 (Sask. Q.B.).

(23) (1982) 3 C.C.C. (3d) 147 (Man. Q.B.).

(24) (1991) 63 C.C.C (3d) 289 (S.C.C.).

self-confessed killer were freed merely because his right to counsel had been violated. The Court found that, due to the Charter violation, the reliability of the accused's confessions was suspect, and he had not had a fair trial. The position of the Appeal Court had effectively presumed the accused's guilt. A majority of the Court also held that the accused's section 10(b) rights had been violated when the police began to suspect him of murder rather than a lesser offence but did not inform him anew of his right to counsel.

As a result of this case, police may have to make extra efforts to ensure that suspects understand their rights, particularly in cases involving children, people who do not speak the language used by the police, and those with diminished mental capacity. This would probably also apply to people who may have trouble comprehending their rights because they are intoxicated or under the influence of drugs. In *R.* v. *Clarkson*,[25] the waiver of the right to counsel was held not to be valid because of the accused's intoxication.

The Supreme Court of Canada has also considered whether there is an obligation upon the police to assist an accused person to exercise the right to counsel. In *R.* v. *Manninen*,[26] the Court held that section 10(b) imposes at least two duties on the police in addition to the duty to inform the detainee of his or her rights.

- First, the police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay; this includes the duty to offer the respondent the use of the telephone. Certain circumstances may make it particularly urgent for the police to continue their investigation before facilitating a detainee's communication with counsel; however, there was no such urgency in *Manninen*.
- Second, the police must refrain from questioning the detainee until the latter has had a reasonable opportunity to retain and instruct counsel. The purpose of granting right to counsel is not only to allow detainees to be informed of their rights and obligations under the law but also, and equally if not more important, to obtain advice as to how to exercise those rights.

In the *Manninen* case, the police officers had informed the respondent of his right to remain silent, but had proceeded to question him after he had "clearly asserted his right to remain silent and his desire to consult a lawyer." For the right to counsel to be effective, the accused would

(25) [1986] 1 S.C.R. 383.

(26) [1987] 1 S.C.R. 1233.

have to have had access to legal advice before being questioned or otherwise required to provide evidence. This aspect of the respondent's right to counsel was clearly infringed, however, as the police had continued questioning when there had been no urgency to justify it. The respondent had not waived his right to counsel by answering the police officers' questions. Although a person may implicitly waive the rights under section 10(b), the standard is very high and was not met in this case.

In *R.* v. *Baig*,[27] the Supreme Court of Canada held that the police obligation to provide an opportunity to retain and instruct counsel was not triggered until the accused expressed a desire to exercise that right. The corollary of this ruling would seem to be that police failure to promote the exercise of a Charter right would not amount to a Charter violation if the accused had not invoked the right.

However, in *R.* v. *Brydges*,[28] the Supreme Court of Canada has since held that an accused's statement that he could not afford a lawyer amounted to a request for counsel. The accused – a resident of Alberta who had been arrested in Manitoba for murder – was informed without delay of his right to retain and instruct counsel. He was again advised of this right at the police station. When the accused asked the investigating officer if Legal Aid existed in Manitoba, because he could not afford a lawyer, the officer replied that he thought there was such a system in the province, but made no attempt to confirm this. When then asked if he had a reason for wanting to speak with a lawyer, the accused said that he had none. After making a number of incriminating statements, the accused asked to speak with a Legal Aid lawyer. After his request had been granted, the accused declined further discussions with the police.

In upholding the trial court decision to exclude the incriminating statements because the accused's rights under section 10(b) had been violated, the Supreme Court of Canada said that "(w)here an accused expresses a concern that the right to counsel depends upon the ability to afford a lawyer, it is incumbent on the police to inform him of the existence and availability of Legal Aid and duty counsel." Here, "the accused was left with the mistaken impression that his inability to afford a lawyer prevented him from exercising his right to counsel." The accused could not waive something he did not fully understand (i.e., his section 10(b) rights).

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(27) [1987] 2 S.C.R. 537.

(28) [1990] 1 S.C.R. 190.

The decision in *Brydges* confirmed that the police are under two additional duties beyond that of informing the detainee of his or her section 10(b) rights: they "must give the accused or detained person a reasonable opportunity to exercise the right to retain and instruct counsel, and ... refrain from questioning or attempting to elicit evidence from the detainee until the detainee has had that reasonable opportunity." The detainee must still exercise "reasonable diligence" in exercising this right and can, either explicitly or implicitly, waive it; however, he or she must understand and be aware of the consequences of so doing and any implicit waiver will be scrutinized very closely by the Court.

The Supreme Court of Canada also said that the police must advise of the existence and availability of duty counsel and Legal Aid in all cases of arrest or detention, not only those where the detainee is or appears to be impecunious. This is the case even if, following advice from the police about section 10(b) rights, the detainee does not ask to speak with a lawyer. If the accused does not make a reasonably diligent effort to exercise the right after such advice is given, then, as the Supreme Court of Canada said in the *Smith*(29) case, the police are not required to refrain further from attempting to elicit evidence.

Notwithstanding *Brydges*, the nature and extent of the advice that must be available to an accused in order to preserve section 10(b) rights were not yet settled. In addition to requiring that detainees be advised of their right of access to duty counsel, the Prince Edward Island Court of Appeal, in *R.* v. *Matheson*,(30) held that *Brydges* meant that it was "up to those responsible for the administration of justice in the Province to ensure that the service is available." Leave to appeal to the Supreme Court of Canada was granted in *Matheson*(31) and in *R.* v. *Prosper*,(32) a decision of the Nova Scotia Court of Appeal that took a different view. On appeal of those two cases, the Supreme Court of Canada ultimately held that "s.10 (b) of the Charter does not impose a positive obligation on governments to provide a system of 'Brydges duty counsel,' or likewise, afford all detainees a corresponding right to free, preliminary legal advice 24 hours a day."(33)

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(29) [1989] 2 S.C.R. 368.

(30) (1992) 78 C.C.C. (3d) 70 (P.E.I. C.A.).

(31) (1994) 92 C.C.C. (3d) 434 (S.C.C.).

(32) [1994] 3 S.C.R. 236.

(33) *Matheson, supra*, note 31 at p. 439.

In *R.* v. *Burlingham*,[34] the Supreme Court of Canada had occasion to consider the obligations of police or Crown counsel with respect to plea bargains. Writing for the majority, Mr. Justice Iacobucci held that section 10(b) "mandates the Crown or police, whenever offering a plea bargain, to tender that offer either to accused's counsel or to the accused while in the presence of his or her counsel, unless the accused has expressly waived the right to counsel." Furthermore, section 10(b) was held to prohibit police "from belittling the accused's lawyer with the express goal or effect of undermining the accused's confidence in and relationship with defence counsel." The majority went on to find that police had infringed Burlingham's right to counsel by placing such an offer directly to the accused and leaving it open only for the period of time they knew that his lawyer was not available. Furthermore, because the accused's confession, the murder weapon, and his girlfriend's testimony would not have been available "but for" the Charter breach, all that evidence would be excluded from a new trial.

Although *Burlingham* states that counsel must be present during any plea-bargaining, generally the right to counsel is not a continuing right.

> It is the right to retain and instruct counsel. Once this has been complied with, that is the end of the right under section 10(b). There is no right to have counsel present at any subsequent stage of the investigation as there is in some jurisdictions. It is assumed that counsel will have given her client advice and instructions as to whether to respond to police questioning and if so, how to respond, and an accused who chooses not to abide by such advice, only has himself to blame. Nevertheless, if subsequent police conduct subverts counsel's effort to protect a client by some trickery that undercuts an accused's right not to speak further to the police, a different right, namely the right to not to be deprived of one's liberty save in accordance with the principles of fundamental justice guaranteed under section 7, may have been infringed.[35]

An example of such a breach is discussed in more detail in the section below entitled "The Right to Remain Silent."

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(34) [1995] 2 S.C.R. 206.

(35) Alan W. Mewett and Shaun Nakatsuru, *An Introduction to the Criminal Process in Canada*, Fourth Edition, Carswell, 2000, p. 25.

INTERROGATION

A police officer, in the course of his or her duties, is authorized to question individuals and may invite individuals to accompany him or her to the police station for that purpose. Generally, however, there is no obligation on the individual to answer these questions or to accept the invitation. As explained above, once a person is arrested or detained, certain Charter rights arise, such as the right to counsel.

A police officer may want to question a suspect as part of the investigative process for many reasons, including establishing if there are reasonable and probable grounds to make an arrest. As stated earlier, the individual is generally under no legal obligation to answer such questions. Although the police obviously hope to obtain a confession, they are also attempting to obtain any information that will lead to a prosecution. "A confession is defined in law as a statement either in writing or given orally by a person accused of a crime which shows or tends to show that he is guilty of the crime with which he is charged. It can be an admission of guilt or an admission of any fact which tends to prove his guilt."(36)

The rules that govern the admissibility of statements made by an accused are complex; a general outline of these rules is presented below.

The general rule is that the Crown will have to prove that any statement made by an accused was made voluntarily and was the product of a conscious operating mind. An early formulation of the rule is found in *R.* v. *Ibrahim*:

> It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.(37)

Confessions that are not made voluntarily are inadmissible for the following reasons:

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(36) Salhany, *The Police Manual of Arrest, Seizure and Interrogation, supra*, note 3 at p. 177.

(37) (1914) A.C. 599 at p. 609.

> The first is the concern about their unreliability. A person who has given a statement as a result of a threat or promise may have given a false confession. The second reason involves the public's perspective. By accepting statements that are not freely given, the public will believe that oppressive conduct by the police is condoned by the courts, and this will result in a loss of support and respect for the criminal justice system by the community.(38)

The prosecution has the burden of showing that the statement was made voluntarily and this issue will be determined at a hearing (known as a *voir dire*) conducted by the trial judge. This hearing is conducted in the absence of the jury, if there is one. At the hearing, the prosecution is required to call as witnesses all police officers who were present when the statement was made.

What conduct by the police will render a statement involuntary? A threat or promise made by the police will generally render a statement inadmissible.

> "Voluntary" means not induced by fear of prejudice or hope of advantage, a definition that has become something of a cliché. Basically, then, a statement is admissible only if the accused made it free from the fear, as a result of the police conduct or statements, that something bad would happen to him if he did not make the statement, or free from the hope that some benefit would accrue to him if he did make the statement. There is not much point in trying to set out the thousands of possible fact situations that might be caught by the rule – they range from the obvious ones of beating or threatening to beat the accused or of threatening to "throw the book at him" if he did not confess or telling him that he would get a lighter sentence or be allowed to see his wife if he did confess, to the less obvious ones such as threatening to deny him bail if he did not confess or promising bail if he did.(39)

The courts will examine the context in which the words were spoken to determine whether there has been a threat or inducement.

Other police conduct that may render a statement inadmissible is an interrogation under oppressive conditions. "Oppressive conditions will have a tendency to sap a person's free will, which is a necessary element of a voluntary confession."(40) Some of the factors that are

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(38) Salhany, *The Police Manual of Arrest, Seizure and Interrogation*, *supra*, note 3 at p. 195.

(39) Mewett and Nakatsuru, *An Introduction to the Criminal Process in Canada*, *supra*, note 35 at p. 170.

(40) Salhany, *The Police Manual of Arrest, Seizure and Interrogation*, *supra*, note 3 at p. 200-201.

considered include the characteristics of the person making the statement, the length of the interrogation, and the lack of refreshments. The court will review all of the circumstances surrounding the interrogations to ensure that there are no factors that may affect the voluntariness of the statement.

Notwithstanding police conduct, the statement made must be the product of the conscious operating mind of the accused. The person must understand the questioning and know what they mean. Not all statements made by an accused will satisfy these requirements.

> An accused may make a statement while he is drunk, or in a state of shock. He could even be under some form of hypnosis or under the influence of medication or drugs. In such cases, he may not be aware of what he is saying or even that he is saying anything. If this is so, it is difficult to call it "his" statement and thus it has no evidentiary value or, if it has some evidentiary value, it may be so slight that its value is outweighed by the opposing prejudicial effect. In these cases, the statement is excluded not because it is not voluntary, but because it cannot be regarded as the statement of the accused.(41)

Thus, police must ensure that the statement made is the product of the conscious operating mind of the accused and that no threat or promises were made. The courts will review all of the circumstances surrounding the interrogation to determine whether the statement was made freely and voluntarily. Although it is forbidden for the police to make a threat or promise, nothing strictly prohibits the police from merely tricking or manoeuvring the accused into making a statement.

> Police officers know quite well what the rules regarding the admissibility of confessions are and, by and large, do not beat accused persons or threaten them or hold out promises, knowing quite well that if they do, the confession is going to be kept out anyway. In any case, there are many ways of getting confessions short of brutality or promises. Trickery, in various forms, is often effective. An undercover policeman will be put in the same cell as the accused and boast of his criminal record. The accused, not to be outdone, then tells him about the offence he is charged with, only to find him as the prosecution's star witness at his trial. Or, when there are two accused, they are put in separate rooms and one is told that the other has pinned all the blame on him, thus spurring the second accused to make a statement admitting guilt, but trying to pin most of the blame on his

(41) Mewett and Nakatsuru, *An Introduction to the Criminal Process in Canada*, *supra*, note 35 at p. 169.

> accomplice. There are many variations of this sort of trickery, but none of them fall within the definition of threats or inducements and are not, therefore, "involuntary" in the classical sense. If there is any objection to them, it is not because they were induced by threats or promises, but because, in some way they are seen to be "unfair," and this raises the more important issue of the effect of the Charter on all of this.(42)

As will be discussed in the next section of the paper, the Charter has been employed to attack certain police tactics that are used to trick an accused into confessing. However, vigorous and skilful questioning, misstatements of fact by the police, and appeals to the conscience of the accused and other similar police tactics will not necessarily render a statement inadmissible.

In 2000, the Supreme Court of Canada had the opportunity to review the scope of the common law confessions rule and the limits it places on police interrogation. *R.* v. *Oickle*(43) was the first time the Court had directly addressed the issue since the introduction of the Charter. In this case, the accused had been convicted based solely on two confessions he made after the police told him he had failed a lie detector test which the police had invited him to take so they could eliminate him as a suspect for a series of suspicious fires. The accused was advised of his Charter rights and of the fact that although the interpretation of the polygraph results was not admissible, anything said by the accused was admissible. The questioning had occurred over several hours.

In its decision, the Court addresses what police can and cannot do with respect to interrogations, including the use of the polygraph. The Court indicated that the Charter does not subsume the common law confessions rule, which has a broader scope than the Charter.(44) According to the Court, the Charter is not an exhaustive catalogue of rights but rather "represents a bare minimum below which the law must not fall."(45) The Court went on to restate the confessions rule.

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(42) *Ibid.*, at p. 171.

(43) (2000) 147 C.C.C. (3d) 321 (S.C.C.).

(44) For example, although evidence obtained in violation of a Charter right will only be excluded if its admission would bring the administration of justice into disrepute, violations of the confessions rule always lead to exclusion.

(45) *Oickle*, *supra*, note 43 at p. 340.

One of the Court's concerns was the problem of false confessions and the important role they play in convicting the innocent. It indicated that the confessions rule is concerned with voluntariness, "broadly defined." The main reason for this concern is that involuntary confessions are more likely to be unreliable. The Court stated that in defining the confessions rule, "it is important to keep in mind its twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes."(46) The approach to be adopted is a contextual one and requires consideration of all relevant factors.

The Court indicated that threats and promises are "the core" of the traditional confessions rule and that therefore it was "important to define precisely what types of threats or promises will raise a reasonable doubt as to the voluntariness of a confession."(47) The Court indicated that it was not necessary that threats or promises be aimed directly at the suspect for them to have a coercive effect and emphasizes that not all threats and promises create as strong an inducement as others. For example, an explicit offer "to procure lenient treatment in return for a confession is clearly a very strong inducement, and will warrant exclusion in all but exceptional circumstances."(48) Meanwhile, an offer of psychiatric assistance or other counselling is an inducement but not as strong as an offer of leniency. In such a case, regard must be had to the entirety of the circumstances. In addition, a confession that is the product of violence will render it inadmissible. However, more subtle, veiled threats may or may not lead to exclusion. For example, phrases such as "it would be better if you told the truth" will not automatically lead to exclusion because the entire context of the confession should be examined to see "if there is a reasonable doubt that the resulting confession was involuntary."(49) With respect to moral or spiritual inducements, they will generally not produce an involuntary confession as "the inducement offered is not in the control of the police officers." For example, if the officer states that the accused will feel better if he or she confesses, the officer is not offering anything. The Court is not willing to prohibit all types of inducements. Police conduct only becomes improper "when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne."(50) The Court stated that the "most important consideration…is to look for

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(46) *Ibid.*, at p. 341.

(47) *Ibid.*, at p. 345.

(48) *Ibid.*, at p. 346.

(49) *Ibid.*, at p. 348.

(50) *Ibid.*, at p. 349.

a *quid pro quo* offer by interrogators, regardless of whether it comes in the form of a threat or a promise."[51]

The Court reiterated that oppressive circumstances have the potential to produce false confessions: "Under inhumane conditions, one can hardly be surprised if a suspect confesses purely out of a desire to escape those conditions. Such a confession is not voluntary."[52] Without trying to offer an exhaustive list of factors that can create an atmosphere of oppression, the Court indicated it included: depriving the suspect of food, clothing, water, sleep or medical attention; denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time. The Court added that the use of non-existent evidence is another possible source of oppressive conditions. Although, standing alone, confronting a suspect with inadmissible or even fabricated evidence is not necessarily grounds for excluding a statement, when combined with other factors, it is a relevant consideration in determining whether a confession was voluntary.

With respect to the operating mind requirement, the Court referred to an earlier decision where it was stated that this requirement "does not imply a higher degree of awareness than knowledge of what the accused is saying and that he is saying it to police officers who can use it to his detriment."[53] The operating mind doctrine does not require a distinct inquiry completely divorced from the rest of the confessions rule because it "is just one application of the general rule that involuntary confessions are inadmissible."

Police trickery, meanwhile, unlike the other factors just discussed, does require a distinct inquiry. Although this concept is still related to voluntariness, the more specific objective of this doctrine "is maintaining the integrity of the criminal justice system." This is accomplished by repressing police conduct that shocks the community.

The Court indicated that although this may suggest that the confessions rule "involves a panoply of different considerations and tests," the basic idea is simple: "a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness." One must determine whether police actions individually, and cumulatively, improperly induced a confession. Thus, where police interrogators "subject the suspect to utterly intolerable conditions, or if they offer inducements strong enough to produce an unreliable

(51) *Ibid.*, at p. 350.

(52) *Ibid.*, at p. 350-351.

(53) *R.* v. *Whittle*, (1994) 92 C.C.C. (3d) 11 (S.C.C.) at p. 27.

confession," the statement should be excluded. In addition, between these two extremes, "oppressive conditions and inducements can operate together to exclude confessions."

> The doctrines of oppression and inducements are primarily concerned with reliability. However, as the operating mind doctrine and the "shocks the community" rule with respect to police trickery demonstrate, the confessions rule also extends to protect a broader conception of voluntariness that focuses on the protection of the accused's rights and fairness in the criminal process.(54)

The Court went on to state the scope of the confessions rule as follows:

> Voluntariness is the touchtone of the confessions rule. Whether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence, this Court's jurisprudence has consistently protected the accused from having involuntary confessions introduced into evidence. If a confession is involuntary for any of these reasons, it is inadmissible.(55)

The Court emphasized that the analysis must be a contextual one. The role of a court is to "strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all aspects of the rule discussed above."(56)

In *Oickle*, the Court made the following findings:

- although the police did minimize the moral significance of the crimes, there was no suggestion that a confession would minimize the legal consequences;
- in telling the accused that he needed help, there was no suggestion that this was a *quid pro quo* for confessing;
- although the police repeatedly told the accused that it would be better if he confessed, there was no implied threat or promise, merely moral inducements which were not improper;
- although the accused's relationship with his fiancée was strong enough to potentially induce a false confession were she threatened with harm, no such threat ever occurred;

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(54) *Oickle*, *supra*, note 43.

(55) *Ibid.*, at p. 354.

(56) *Ibid.*, at p. 354-355.

- the gentle, reassuring manner in which the police gained the accused's trust was not improper; and
- there was no atmosphere of oppression.

The Court then went on to discuss how polygraphs fit into the analytical framework of voluntariness. The Court concluded as follows:

> In this case, the police conducted a proper interrogation. Their questioning, while persistent and often accusatorial, was never hostile, aggressive, or intimidating. They repeatedly offered the accused food and drink. They allowed him to use the bathroom upon request. Before his first confession and subsequent arrest, they repeatedly told him that he could leave at any time. In this context, the alleged inducements offered by the police do not raise a reasonable doubt as to the confessions' voluntariness. Nor do I find any fault with the role played by the polygraph test in this case. While the police admittedly exaggerated the reliability of such devices, the tactic of inflating the reliability of incriminating evidence is a common, and generally unobjectionable one. Whether standing alone, or in combination with the other mild inducements used in this appeal, it does not render the confessions involuntary.(57)

The only aspect of the confessions rule which may have special application to drug cases is the operating mind doctrine. If the accused is sufficiently under the influence of a drug that it becomes questionable whether he or she knows what they are saying or that they are saying it to police officers who can use it to their detriment, a court may find that any such confession is inadmissible.

One point to bear in mind is that if a confession is obtained in breach of the confessions rule, the confession will be excluded from trial. With respect to Charter violations, however, the evidence will only be excluded if it would bring the administration of justice into disrepute. Although, as will be discussed below, evidence emanating from the accused person (conscriptive evidence) will almost always be excluded under the Charter.

It should be noted that the *Young Offenders Act*(58) sets out special rules regarding the admissibility of statements made by young persons.

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(57) *Ibid.*, at p. 331-332.

(58) R.S.C. 1985, c. Y-1.

A. The Right to Remain Silent

In addition to the common law confessions rule, certain Charter rights protect an accused's right to remain silent and the right to not incriminate himself or herself. As discussed above, the confessions rule attempts to ensure that any confession made by an accused is voluntary. Even when the "voluntariness" of the statement is not in question, the courts have in certain cases deemed it appropriate to intervene.

Sections 11(c) and 13 of the Charter protect the right of persons not to incriminate themselves by guaranteeing the "non-compellability of an accused as a witness at his own trial and the protection against not having his testimony used against him in further proceedings."[59]

In addition, the Supreme Court of Canada has also recognized that the right to remain silent is protected as a fundamental principle of justice under section 7 of the Charter. Section 7 provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. In *R.* v. *Hebert*,[60] the accused was arrested and informed of his right to retain and instruct counsel. The accused did consult with counsel and indicated that he did not wish to make a statement. Later, police placed the accused in a cell with an undercover police officer who was posing as a suspect under arrest. The accused made various incriminating statements. The Supreme Court of Canada indicated that the right to silence includes the right to choose whether to make a statement to the authorities or to remain silent. The police should not be able to use tricks to negate the accused's decision to remain silent. According to McLachlin J., the right to silence, however, was subject to the following rules:

> First, there is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. Presumably, counsel will inform the accused of the right to remain silent. If the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation of the Charter. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence.
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> Secondly, it applies only after detention. Undercover operations prior to detention do not raise the same considerations. The jurisprudence

(59) Salhany, *The Police Manual of Arrest, Seizure and Interrogation, supra*, note 3 at p. 181.

(60) (1990) 57 CCC (3d) 1 (S.C.C.).

> relating to the right to silence has never extended protection against police tricks to the pre-detention period. Nor does the Charter extend the right to counsel to pre-detention investigations. The two circumstances are quite different. In an undercover operation prior to detention, the individual from whom information is sought is not in the control of the state. There is no need to protect him from the greater power of the state. After detention, the situation is quite different; the state takes control and assumes the responsibility of ensuring that the detainee's rights are respected.
>
> Thirdly, the right to silence predicated on the suspect's right to choose freely whether to speak to the police or to remain silent does not affect voluntary statements made to fellow cellmates. The violation of the suspect's rights occurs only when the Crown acts to subvert the suspect's constitutional right to choose not to make a statement to the authorities. This would be the case regardless of whether the agent used to subvert the accused's right was a cellmate, acting at the time as a police informant, or an undercover police officer.
>
> Fourthly, a distinction must be made between the use of undercover agents to observe the suspect, and the use of undercover agents to actively elicit information in violation of the suspect's choice to remain silent. When the police use subterfuge to interrogate an accused after he has advised them that he does not wish to speak to them, they are improperly eliciting information that they were unable to obtain by respecting the suspect's constitutional right to silence: the suspect's rights are breached because he has been deprived of his choice. However, in the absence of eliciting behaviour on the part of the police, there is no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police...
>
> Moreover, even where a violation of the detainee's rights is established the evidence may, where appropriate, be admitted. Only if the court is satisfied that its reception would be likely to bring the administration of justice into disrepute can the evidence be rejected: s. 24(2). Where the police have acted with due care for the accused's rights, it is unlikely that the statements they obtain will be held inadmissible.(61)

B. The Right to Retain Counsel

(61) *Ibid.*, at p. 41-43.

This right was reviewed in the previous section of this paper dealing with arrest and detention. If an accused is not informed of his or her right to counsel and given the opportunity to exercise that right, any statement made by the accused may be inadmissible under the Charter even if it was made voluntarily.

SEARCH AND SEIZURE

Due to the nature of drug-related offences, the prosecution's key piece of evidence will often be the drugs themselves. Defence strategy is sometimes limited to attempting to have this evidence excluded from the trial, for example by reason of an unreasonable search and seizure. If the defence succeeds, it becomes very difficult, if not impossible, to obtain a conviction. Thus, many cases dealing with whether a police search and seizure was reasonable are in relation to drug offences.

A. Powers to Conduct Searches

1. *Criminal Code*

A search has been defined as "an examination, by agents of the state, of a person's person or property in order to look for evidence."(62) For a search to be lawful, the police require some type of authorization, whether in legislation or pursuant to the common law as set out by the courts.(63)

An example of legislative authorization to conduct a search is found in section 487 of the *Code*. This provision allows a justice to issue a search warrant when satisfied, after a police officer has sworn under oath, that there are reasonable grounds to believe that there is in a building, receptacle or place:

- anything on or in respect of which any offence against the *Code* or any other Act of Parliament has been or is suspected to have been committed;

(62) Peter W. Hogg, *Constitutional Law of Canada* (Loose Leaf Edition), Volume 2, Carswell, p. 45-4.

(63) A search can also be conducted with consent.

- anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against the *Code* or any other Act of Parliament;
- anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant; or
- any offence-related property.

Although a search warrant applies to a building, receptacle or place, it does not cover the body of the person. Thus, in executing a search warrant under section 487, the police do not have a right to search people found on the premises. However, as will be discussed later, the police may search a person who has been lawfully arrested. Also of note is that the section requires that there are reasonable grounds to believe certain facts. Thus, more than mere suspicion is required. A warrant must be executed by day (between 6 a.m. and 9 p.m.) unless the justice specifically authorizes otherwise.(64)

Police are authorized to seize the items listed in the search warrant and other items that are in plain view. Once seized, these items must then generally be taken before a justice of the peace.

The *Code* allows a police officer to obtain such a search warrant from a judicial officer by telephone or other telecommunication (telewarrant) where he or she believes that an indictable offence has been committed and it would be impractical to obtain a search warrant personally.(65)

Other types of search warrants are available under the *Code*, for example a warrant to obtain DNA samples(66) and a general warrant which authorizes the police to "use any device or investigative technique or procedure or do anything described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or person's property."(67) This general warrant can only be used when there is no other provision in

(64) See *Criminal Code* section 499.

(65) *Ibid.*, section 487.1.

(66) *Ibid.*, section 487.05.

(67) *Ibid.*, section 487.01.

the *Code* or other federal legislation that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done. One such example is the use of video surveillance. In all cases, the requirements to obtain such warrants are set out in the *Code* and must be satisfied.

The *Code* also allows a police officer to exercise all of the powers described in subsection 487(1) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impractical to obtain a warrant.(68) This allows a police officer to conduct a search without a warrant in emergency situations. Warrantless searches are the exception to the rule and are discussed in more detail in following sections of this paper.

In addition to the search and seizure powers discussed above, the *Code* also contains specific powers of search and seizure for certain offences.(69) Most of the provisions in the *Code* deal with the searching of premises and are generally silent on the issue of searches of the person.(70) There are, however, a few exceptions. For example, section 117.02(1) of the *Code* authorizes a search without warrant of a person, vehicle or place, other than a dwelling-house, if the police officer believes on reasonable grounds that a weapon was used in the commission of an offence or a weapons offence is being or has been committed. Such a search is only allowed if the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it is not practical to obtain one. This search power is limited to the specific offences listed and is permitted only if the conditions set out in the legislation are satisfied.

Additional search provisions are found in other federal criminal legislation. For example, the *Controlled Drugs and Substances Act*, the *Official Secrets Act* and the *Customs Act* contain provisions that authorize searches, even searches of the person. Statutory provisions allowing for the search of the person are fairly rare and usually such a search is only justified if conducted incidental to arrest, a common law power that is discussed below.

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(68) *Ibid.*, section 487.11.

(69) For example, see *Criminal Code* section 117.02 (weapons), section 164 (obscene publications), and section 199 (gaming).

(70) Section 487.05 of the *Criminal Code* does provide a legislative scheme for obtaining a search warrant to seize bodily substances for the purpose of forensic DNA analysis. Prior judicial authorization is needed, and the section sets out the criteria that must be satisfied to obtain such a warrant.

2. *Controlled Drugs and Substances Act*

Writs of assistance, which were repealed in 1985, gave peace officers the power to search without first having to obtain a warrant. Such powers were found in previous versions of the *Customs Act*, the *Excise Act*, the *Food and Drugs Act* and the *Narcotic Control Act*. "In essence, they are documents that identify their holders as members of a specific class of peace officers with special powers of warrantless search and seizure."(71) Writs of assistance have been described as follows:

> Statutory writs of assistance are, in effect, search warrants unrelated to any particular suspected offence, and they are of continuing operation. They are issued to members of the R.C.M.P. and other officers in the service of the Government of Canada to have effect as long as the holder continues to hold the position by some virtue of which the writ was issued to him.(72)

The significant feature of a writ of assistance was the discretion that was given to the holder of a writ. Some of the discretionary powers granted to an officer included:

1) the right to search without having to justify his or her entry onto private domains against any standard of reasonable or probable cause, either before or after the event;
2) the right to search without confining his or her search to any particular premises; and
3) the right to search without restricting seizures to items identified before commencing the intrusion.(73)

The actual discretionary powers given under a writ of assistance depended on the language of the legislation that established the writ. Before its repeal in 1985, section 10(1) of the *Narcotic Control Act* allowed peace officers acting under "the authority of a writ of assistance or a warrant" to enter and search a dwelling-house "at any time," so long as the peace officer had a reasonable belief that there was a narcotic in the house "by means of or in respect

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(71) Law Reform Commission of Canada, *Police Powers – search and seizure in criminal law enforcement*, Working Paper 30, 1983, p. 35.

(72) Police Ontario, para. 8, *Canadian Encyclopedic Digest*, on CD-ROM.

(73) Law Reform Commission of Canada, *Police Powers – search and seizure in criminal law enforcement*, *supra*, note 71 at p. 36.

of which" an offence under the Act had been committed. Although writs of assistance were issued by judges of the Federal Court of Canada, the powers conferred on the peace officer were statutory powers, rather than orders or judgements, because the role of the court was "essentially clerical, giving formal effect to a ministerial decision."(74)

The writ of assistance pursuant to the *Narcotic Control Act* could not "be delegated from one peace officer to another as could early customs writs."(75) Another important feature of the writs under the *Narcotic Control Act* is the reasonableness restrictions that were added. "While the writs themselves indicate that the bearer may conduct searches 'at any time,' the use of the writs is governed by subsections 10(1) of the *Narcotic Control Act*… Like an officer exercising other warrantless powers of search under these provisions, a writ-holder is required to refer to requirements of reasonable belief that there are narcotics present."(76) The writ of assistance did give a peace officer a power of search and seizure that his writless counterpart lacked, i.e., "the discretion to enter a dwelling-house to search for narcotics or drugs without a warrant."(77)

Section 8 of the Charter eventually brought an end to writs of assistance. As a result of the Supreme Court of Canada's interpretation of everyone's right to be secure against unreasonable search and seizure, in *Hunter* v. *Southam*,(78) the provisions authorizing writs of assistance under the *Narcotic Control Act* were repealed.(79) In subsequent appeals of two cases involving writs of assistance,(80) the Crown acknowledged the constitutional invalidity of the writs with the result that the issue was not argued before the Supreme Court of Canada.

Today, the *Controlled Drugs and Substances Act* (the *CDSA*)(81) establishes a comprehensive search and seizure scheme for drug-related offences. These provisions are similar to the search and seizure provisions in the *Code*. Section 11(1) of the *CDSA* allows a

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(74) *Ibid.*, at p. 38.

(75) *Ibid.*, at p. 37.

(76) *Ibid.*, at p. 38.

(77) *Ibid.*, at p. 37-38.

(78) (1984), 11 D.L.R. (4th) 641.

(79) Similar provisions in the *Food and Drugs Act*, the *Excise Act* and the *Customs Act* were all repealed at the same time. See *Criminal Law Amendment Act* (1985), S.C. 1985, ch. 19, s. 200.

(80) *R.* v. *Sieben* (1987) 1 S.C.R. 295; *R.* v. *Hamill* (1987) 1 S.C.R. 301.

(81) S.C. 1996 c. 19.

justice to issue a search warrant if he or she is satisfied by information on oath that there are reasonable grounds to believe that specific items are in a place. These items are:

- a controlled substance or precursor in respect of which the *CDSA* has been contravened;
- anything in which a controlled substance or precursor referred to in paragraph (a) is contained or concealed;
- offence-related property; or
- anything that will afford evidence in respect of an offence under the *CDSA*.

> This provision is broader than the one in the previous *Narcotic Control Act.*
>
> Because of this broader provision, a warrant can be obtained even where there is no reason to believe that there are drugs in the place being searched, as long as there are grounds respecting the presence of one of the other three types of 'things.' Based on this new power, there is no longer a reason for the investigator to use a *Criminal Code* warrant, as was the case in certain circumstances under the old legislation.(82)

The *CDSA* authorizes a search "at any time." Thus, there is no requirement to obtain authorization to search at night as in the case of a search under the *Code*. As with the Code, telewarrants are available under the *CDSA*.

Subsection 11(5) of the *CDSA* also allows the police to conduct searches of the person in certain circumstances. This power is not found in the *Code* although the police do have a common law power of search incidental to arrest. The *CDSA* gives the police, in the process of executing a search warrant pursuant to subsection (1), the power to search a person for a controlled substance or other specified items. This can only be done if the officer has reasonable grounds to believe that the person found in the place set out in the warrant has in their possession a controlled substance or other specified items set out in the warrant. Thus, this provision authorizes the police to conduct a search of the person even if no arrest is made, but only for specified items and only if the officer has reasonable belief of certain facts. It does not give an officer "carte blanche" to search everyone on the premises.

Subsection (7) allows the police to conduct a search described in subsections (1), (5) or (6) without a warrant "if the conditions for obtaining a warrant exist but by reason of

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(82) Theresa M. Brucker, *The Practical Guide to the Controlled Drugs and Substances Act*, Second Edition, Carswell, 1999, p. 80.

exigent circumstances it would be impractical to obtain a warrant." As will be discussed later in this paper, warrantless searches are presumed to be unreasonable but the courts have allowed for exceptions. The rules have been summarized as follows:

> A warrantless search has been justified where, based on the circumstances of the search, it was not feasible to obtain the warrant; for example, where a vehicle, airplane or other conveyance having the ability to change location is the subject of the search. The onus in such cases is on the Crown to establish that the obtaining of a warrant in the circumstances of the specific case would impede the effectiveness of the enforcement of the law.
>
> Where there is no common law search power regarding searches in "exigent circumstances", the courts have held that it is necessary for the enabling legislation to specifically refer to a warrantless search power in certain circumstances, for example, exigent circumstances. Such legislative provisions should narrowly define the type of investigation which would permit the use of a warrantless search.(83)

Although exigent circumstances may be created by the presence of drugs in a vehicle and thus render a warrantless search reasonable, whether a warrantless search of a person's home in exigent circumstances will be found to be constitutional is still in doubt.(84) The courts will require some public interest sufficiently compelling to override the privacy interests attaching to the home. One example of such a compelling interest is the preservation of human life or safety.(85)

The legislation also allows:

- a police officer to seize things not specified in the warrant if the officer believes on reasonable grounds that they are items mentioned in subsection (1)(86); and
- the power to seize anything that the officer believes on reasonable grounds has been obtained by or used in the commission of an offence (not limited to drug offences) or will afford evidence in respect of an offence.(87)

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(83) *Ibid.*, at p. 83.

(84) In *R.* v. *Feeney*, the Supreme Court of Canada refused to deal with the issue because, according to the Court, exigent circumstances did not exist when the arrest was made.

(85) *R.* v. *Godoy*, (1999) 131 C.C.C. (3d) 129 (S.C.C.).

(86) See *Controlled Drugs and Substances Act*, section 11(6).

(87) See *Controlled Drugs and Substances Act*, section 11(8).

Section 12 allows a police officer who is executing a warrant to "enlist such assistance as the officer deems necessary" and "use as much force as is necessary in the circumstances." It should be noted that the search provisions in the Code do not specify that force may be used.

Things seized under the *CDSA* can be classified either as offence-related property (for example, money and automobiles) or controlled substances ("drugs"), with specific rules regarding detention and forfeiture for each category. The legislation also provides for the search, seizure, detention and forfeiture of proceeds of crime in relation to drug-related offences by incorporating the proceeds of crime provisions of the *Criminal Code*.

In executing a search warrant, the general rule is that the police should announce themselves before entering a place. The Supreme Court of Canada has held in a drug-related case "that the police may enter a dwelling-house without first announcing their presence if it is necessary to do so to prevent the destruction of evidence."(88) Because of the nature of drug offences and the need in many cases for the police to surprise the occupants of a dwelling-house whom they have reason to believe are dealing in drugs, the exception may apply more often to drug-related searches. However, the Supreme Court of Canada did not deal with whether, in drug searches, there is a blanket authorization to enter without a prior announcement. The view set out in *Gimson* "is now subject to the Supreme Court's decision in *Feeney* where the Court disapproved of warrantless searches of a dwelling house except in the case of hot pursuit and stressed the importance of prior announcement before entering a dwelling house without a warrant."(89)

B. Section 8 of the Charter

Section 8 of the Charter states:

> Everyone has the right to be secure against unreasonable search and seizure.

(88) *R.* v. *Gimson*, (1991) 69 C.C.C (3d) 552 (S.C.C.).

(89) Salhany, *The Police Manual of Arrest, Seizure and Interrogation, supra*, note 3 at p. 166-167.

A variety of court decisions have dealt with the question of whether searches are reasonable in various situations and the ancillary question of whether evidence obtained during the searches can be adduced at trial. As will be discussed in more detail, a search will generally be reasonable if: it is authorized by law; the law itself is reasonable; and the search is carried out in a reasonable manner. There must be some authorization for the search, whether in legislation or pursuant to the common law as set out by the courts. The section 8 protection is not against illegal searches but rather against unreasonable searches. This means that even if the search is legal (for example, authorized by a statute), it may be unconstitutional if the courts find that the statute violates the Charter by authorizing an unreasonable search. Conversely, an illegal search does not automatically mean that it is unreasonable although this will usually be the case. It is only when a search is unreasonable that the evidence must be excluded if to admit it would bring the administration of justice into disrepute. Some of the key issues in relation to search and seizure are discussed below.

1. A "Reasonable Expectation of Privacy"

The concept of "reasonable expectation of privacy" plays a crucial role in helping to determine whether section 8 protections apply and to what extent the "regular" standards established under section 8 apply to a particular circumstance.

> …the Chief Justice also made it clear that these new Charter standards only applied where there was a "reasonable" expectation of privacy. The limiting term "reasonable" implied that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement. Reasonable expectation of privacy therefore becomes the trigger for any section 8 protection. Where there is no reasonable expectation of privacy there is no protection at all.(90)

Thus, section 8 protects the public's reasonable expectation of privacy from state intrusions. Where there is no reasonable expectation of privacy, section 8 does not apply. In addition, a diminished expectation of privacy (for example, in prisons or at border crossings) will lower the standard of reasonableness (for example, excusing the absence of a warrant or reducing the

(90) Don Stuart, "The Unfortunate Dilution of Section 8 Protection," *Queens Law Journal*, Volume 25, Number 1, Fall 1999, p. 68.

standard required for justifying the search). Thus, it is clear that this concept plays a central role in determining whether the search was reasonable. Clearly, a person's home is where there would be the greatest expectation of privacy and a greater degree of constitutional protection. This is why an entry into a person's home generally requires prior authorization and reasonable grounds for it to be deemed reasonable. A warrantless search of a person's home requires some statutory authority or must be done in the exercise of a common law power, and such authority will be reviewed to ensure that it is reasonable (for example, by limiting the power to exigent circumstances). Warrantless searches are discussed in more detail below.

In *Weatherall* v. *Canada (Attorney General)*,[91] the Supreme Court of Canada held that section 8 of the Charter was not called into play by frisk searches and unannounced cell patrols conducted in male prisons by female guards. Because "imprisonment necessarily entails surveillance, searching and scrutiny," prisoners "cannot hold a reasonable expectation of privacy with respect to these practices." The Supreme Court of Canada has since relied on the lack of such expectation to deny section 8 protection in a number of cases. For example, in *R.* v. *Edwards*,[92] the Court held that an accused did not have a "reasonable expectation of privacy" at his girlfriend's apartment and, consequently, he could not contest the admissibility of evidence found there. Similarly, in *R.* v. *Belnavis*,[93] a six-to-three majority of the Supreme Court of Canada agreed that a passenger in a private motor vehicle had no expectation of privacy either in the vehicle or in relation to items seized from it, unlike the driver, who was driving with the apparent permission of the owner. Likewise, in *R.* v. *Lauda*,[94] a unanimous Supreme Court of Canada found that a trespasser growing marijuana in abandoned fields had "no reasonable expectations of privacy" in the property. With respect to automobiles, "although there remains an expectation of privacy, it is markedly decreased relative to the expectation of privacy in one's home or office."[95]

In the landmark case of *R.* v. *M. (M.R.)*,[96] a majority of the Supreme Court of Canada has also held that a student's reasonable expectation of privacy in the school

(91) [1993] 2 S.C.R. 872.

(92) [1996] 1 S.C.R. 128.

(93) [1997] 3 S.C.R. 341.

(94) [1998] 2 S.C.R. 683

(95) *R.* v. *Wise* (1992) 70 C.C.C. (3d) 193 (S.C.C.).

(96) [1998] 3 S.C.R. 393.

environment is "significantly diminished" because school authorities are responsible for "providing a safe environment and maintaining order and discipline in the school." In the case of searches by school authorities (not the police), there is no requirement for a warrant and the standard is reasonable belief. The school authority must not, however, be an agent of the police. The Court added that students must know "that this may sometimes require searches of students and their personal effects and the seizure of prohibited items." In the result, the Court held that the seizure of marijuana from a student searched during a school dance did not infringe his rights under section 8 of the Charter. While setting out the parameters for a reasonable warrantless search in such circumstances, it must be noted that the majority decision expressly limited its findings to the elementary or secondary school milieu, with "no consideration" having been given to a college or university setting. In dissent, Mr. Justice Major agreed with the trial judge's opinion that the vice-principal was acting as an agent of the police officer who was present at the time of the search. Major J. would, therefore, have excluded the evidence because it had been obtained in breach of the accused's section 8 Charter rights and its admission "would adversely affect trial fairness."

The courts have adopted a contextual approach with respect to determining whether this is a reasonable expectation of privacy. Factors to be considered in assessing the circumstances may include:

- presence at the time of the search;
- possession or control of the property or place searched;
- ownership of the property or place;
- historical use of the property or item;
- the ability to regulate access, including the right to admit or exclude others from the place;
- the existence of a subjective expectation of privacy; and
- the objective reasonableness of the expectation.(97)

2. "Warrantless" Searches

Although the Charter does not specifically require that police obtain a search warrant to conduct a search, the Supreme Court of Canada in *Hunter* v. *Southam Inc*. has established a

(97) *R.* v. *Edwards*, (1996) 104 C.C.C (3d) 136 (S.C.C.).

presumption that a warrantless search is unreasonable.(98) In this leading case on search and seizure, the Court established the following rules for a valid search:

> While there may be exceptional cases in which different criteria may be justified, normally a valid search requires (i) a prior authorization, (ii) granted by an independent person acting judicially, (iii) based upon reasonable and probable grounds for believing in the prior existence of facts justifying the search, (iv) sworn to under oath by the person seeking the authorization. The case did not strike down all searches not conforming to these minimum standards, but would require that any departure from them be demonstrably justified in the circumstances.(99)

In *Hunter*, the Supreme Court of Canada determined that section 8 of the Charter was applicable to the search and seizure sections of the *Combines Investigation Act*. The Court found these sections to be unconstitutional for two reasons. First, the person designated to authorize the search under the legislation was not capable of acting judicially because he was also charged with investigative and prosecutorial functions as a member of the Restrictive Trade Practices Commission. Second, the sections of the *Combines Investigation Act* that dealt with authorizing searches and seizures did not achieve the minimum standard required by the Charter. According to this standard, there must be reasonable and probable grounds, established under oath, to believe that an offence has been committed and that evidence of this offence is to be found at the place of the search. Thus, the Court concluded that the search and seizure sections of the *Combines Investigation Act* were inconsistent with the Charter and therefore of no force or effect.

Thus, the general rule for a valid search is that the police will require prior authorization to conduct the search (for example, by obtaining a search warrant) and reasonable and probable grounds that justify it. Once these requirements are satisfied, state intrusion on privacy would be justified. As stated previously, these standards apply where there is a reasonable expectation of privacy, and section 8 protection varies depending on the context. For example, there will be greater constitutional protection when the search involves state intrusion into a person's home; however, the safeguards may be reduced in the case of a search at the border.

Although this is the general rule, there are exceptions. It is recognized that a prior authorization is not always feasible. With respect to these exceptions, the courts require some

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(98) *Hunter (Director of Investigation & Research)* v. *Southam Inc*. (1984) 14 C.C.C. (3d) 97 (S.C.C.).

authority, in statute or at common law, to conduct warrantless searches. The existence of such authority is not enough, however, because the courts will also review this authority to ensure that it is reasonable. In defining what is reasonable, the courts have established that warrantless searches should generally be limited "to situations in which exigent circumstances render obtaining a warrant impracticable."[100]

In *Collins* v. *The Queen*,[101] the Supreme Court of Canada said that the Crown has the burden of establishing that a warrantless search is reasonable; a search will be reasonable if it is authorized by a law that is reasonable and is carried out in a reasonable manner. Previously, section 10 of the *Narcotic Control Act* authorized police officers to search without warrant a place other than a dwelling-house, if they had reasonable grounds to believe that it contained a narcotic in respect of which an offence had been committed.

In *R.* v. *Kokesch*,[102] the police conducted a "perimeter search" of the accused's property in order to find evidence of cultivation and possession of narcotics for the purpose of trafficking. The Supreme Court of Canada held that, where there was a mere suspicion of the crime, such conduct amounted to an unreasonable search and seizure. The police do not have the power under the common law to trespass on private property to conduct a search.

In the *Grant* and *Plant* decisions, both released 30 September 1993, the Supreme Court of Canada clarified a number of outstanding search and seizure issues. Like *Kokesch*, the two cases involved warrantless perimeter searches of private dwellings in the investigation of drug offences. In *R.* v. *Grant*,[103] the Court held that "warrantless searches pursuant to section 10 of the *Narcotic Control Act* must be limited to situations in which exigent circumstances render obtaining a warrant impracticable," in order to avoid violation of section 8 of the Charter. This exception to the general rule must be narrowly construed. Exigent circumstances would include "imminent danger of the loss, removal, destruction or disappearance of the evidence," should the search be delayed to obtain a warrant. In the absence of evidence demonstrating those exigent circumstances, two warrantless searches conducted by the police were held to be unreasonable and in violation of section 8. Even without the information gained through the warrantless perimeter searches,

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(99) Mewett and Nakatsuru, *An Introduction to the Criminal Process in Canada*, *supra*, note 35 at p. 42.

(100) *R*. v. *Grant* (1993) 84 C.C.C. (3d) 173 (S.C.C.) at p. 188.

(101) [1987] 1 S.C.R. 265.

(102) [1990] 3 S.C.R. 3.

(103) (1993) 84 C.C.C. (3d) 173.

however, there had been sufficient information to sustain the warrant subsequently obtained by the police to search inside the house. The Court nevertheless considered excluding the evidence pursuant to section 24(2) of the Charter, because there was a "sufficient temporal connection" between the invalid perimeter search and the evidence obtained pursuant to the valid warrant. The Court ultimately decided that the administration of justice would not be brought into disrepute by the admission of the evidence of marijuana plants found in the house. Even though the warrantless perimeter search involved a trespass by state agents where there was no urgency, the police had acted in good faith, the charges involved serious indictable offences, and the admission of "real" evidence would not tend to render the trial unfair.

Thus, in *Grant*, the Supreme Court of Canada indicated that warrantless searches must be limited to situations in which exigent circumstances render obtaining a warrant impractical. Although the case did not concern the search of a motor vehicle, the Court stated the following:

> Exigent circumstances will often be created by the presence of narcotics on a moving conveyance such as a motor vehicle, a water vessel or aircraft. However, I do not favour a blanket exception for this species of private property. Such an exception does exist under the American Constitution. In *Rao*, supra, Martin J.A. pointed out the justification for the American exception was that vehicles, vessels and aircraft may move away quickly and frustrate an investigation. While I accept this fact, I must also be mindful of the fact that this court has recognized the existence of an expectation of privacy in respect of motor vehicles, albeit on a lower scale than that which exists in relation to a dwelling or a private office…
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> To sum up on this point, s. 10 may validly authorize a search or seizure without warrant in exigent circumstances which render it impracticable to obtain a warrant. Exigent circumstances will generally be held to exist if there is an imminent danger of the loss, removal, destruction or disappearance of the evidence if the search or seizure is delayed. While the fact that the evidence sought is believed to be present on a motor vehicle, water vessel, aircraft or other fast moving vehicle will often create exigent circumstances, no blanket exception exists for such conveyances.(104)

Thus, because of the reduced expectation of privacy in motor vehicles and the fact that they are mobile, the courts are more willing to allow warrantless searches of automobiles than homes. The

(104) *Ibid.*, p. 189.

fact that the evidence is present in an automobile will often create the exigent circumstance needed to justify a warrantless search. It is clear that this may apply in cases of drug-related offences.

In *R.* v. *Plant*,[105] six of seven judges in the Supreme Court of Canada held that there was no reasonable expectation of privacy in relation to computerized records of electricity consumption that would outweigh the state interest in enforcing laws against narcotics offences. Acting on an anonymous tip that marijuana was being grown in a basement, Calgary police had accessed utility records showing electricity consumption in the building to be four times the average of that in comparable properties. The Court held that the transaction records maintained as a result of the commercial relationship between the accused and the utility could not be characterized as confidential: the police were permitted computer access through a password; and the information was also open to inspection by members of the public. Because the warrantless search of computer records was not unreasonable and did not fall within the parameters of section 8 of the Charter, evidence of the accused's high electricity consumption could be used to support an application for a search warrant under the *Narcotic Control Act*; however, information obtained by warrantless perimeter search could not be so used. Concurring in the result, Madam Justice McLachlin argued that there was "a sufficient expectation of privacy to require the police to obtain a warrant before eliciting the information" relating to electricity consumption.

In *R.* v. *Silveira*,[106] the Supreme Court of Canada considered the validity of police actions in another drug investigation where, following the appellant's arrest, police had entered his home without a warrant in order to secure the premises and prevent the destruction of evidence. In the meantime, a search warrant was sought and obtained; a subsequent search of the home uncovered quantities of drugs and marked cash previously used by undercover officers when buying drugs from a third party. Writing for the majority, Mr. Justice Cory noted that the Crown had properly conceded that police action constituted a breach of the appellant's section 8 rights. The search was not authorized by law and thus unreasonable for two reasons: the *Narcotic Control Act* did not provide for an exigent circumstances exception to the warrant requirement in the case of a home; and such a power was not found at common law. It should be noted that the *CDSA* now contains the authorization to search any place without a warrant in exigent circumstances. In spite of the breach, Cory J. upheld the use of the resulting evidence after considering the three tests for

(105) [1993] 3 S.C.R. 281.

(106) [1995] 2 S.C.R. 297.

exclusion under section 24(2) as previously set out in *Collins*. First, because the evidence would have been found in any event, its admission was held not to affect the fairness of the trial. Second, although the facts revealed a serious Charter breach, the violation was committed under exigent circumstances with no evidence of bad faith on the part of the police. Finally, because of the seriousness of the crime and the need for the impugned evidence to prove the case, "[t]he admission of the evidence would not have an adverse effect upon the reputation of the administration of justice." However, the majority also emphasized that "after this case it will be rare that the existence of exigent circumstances alone will allow for the admission of evidence obtained in a clear violation of s. 10 of the *Narcotic Control Act* and s. 8 of the Charter."

With respect to other forms of warrantless search, the Supreme Court of Canada has further held that "sniffing" for marijuana at the door of a suspect's house constituted an unreasonable search. Thus, a warrant supported by the "evidence" thereby obtained was found to be invalid. Writing for the majority in *R.* v. *Evans*,(107) Mr. Justice Sopinka acknowledged an "implied invitation" extending to members of the public, including the police, to knock in order to communicate with the occupants of a dwelling. The police had approached with the intention of securing evidence against the occupant; thus, they were engaging in a search, which the lack of any prior authorization rendered unreasonable and in violation of section 8 of the Charter. Because, however, the police had acted in good faith, the impugned real evidence (in the form of marijuana plants) existed irrespective of the Charter violation, and the violation was not particularly grave, the Supreme Court of Canada held that the evidence was admissible because exclusion would have been more harmful to the administration of justice.

In *R.* v. *Feeney*,(108) the Supreme Court of Canada had occasion to consider the post-Charter law of arrest following forced entry into a dwelling-house, with or without a warrant. The common law had previously allowed police to enter a dwelling-house without a warrant, in order to effect an arrest, provided certain specific criteria were met. However, a five-to-four majority in the *Feeney* case decided that, post-Charter, "generally a warrant is required to make an arrest in a dwelling house," except in cases of "hot pursuit." The Supreme Court of Canada went on to say that an ordinary arrest warrant would be insufficient because it contains no express power of trespass. Privacy rights protected by the Charter "demand that the police, in

(107) [1996] 1 S.C.R. 8.

(108) (1997) 115 C.C.C. (3d) 129 (S.C.C.).

general, obtain prior judicial authorization of entry into the dwelling-house in order to arrest the person." Furthermore, if the *Criminal Code* "currently fails to provide specifically for a warrant containing such prior authorization, such a provision should be read in." Because of the failure to obtain a warrant, in combination with other Charter violations, the Supreme Court of Canada excluded much of the evidence obtained as a result of a forced entry into the accused's dwelling-house and ordered a new trial. Although the decision dealt with powers of arrest, it is an example of the Supreme Court of Canada's vigilance in protecting a person's home from state intrusion. In addition, the decision does affect the common law powers of search incidental to arrest and the plain view doctrine when it comes to an arrest at a dwelling-house. Both of these common law warrantless search powers are discussed later in this paper. In response to the decision in the *Feeney* case, the *Code* was amended to provide a mechanism for peace officers to obtain prior judicial authorization to enter a dwelling-house for the purposes of making an arrest.(109) One of the amendments allows a police officer to arrest without warrant if by reason of exigent circumstances it is impractical to get one. Exigent circumstances are defined to include not only that entry is required to prevent imminent bodily harm or death, but also that entry is required to prevent the imminent loss or destruction of evidence. The Supreme Court of Canada in *Feeney* left the issue of whether there should be an exception for exigent circumstances to another day and it is clear that this provision may be challenged in the future.

Clearly, where it is feasible, the police should obtain a warrant to conduct a search or otherwise face the possibility that the search will be found to be unreasonable. Prior authorization provides a safeguard against unjustified state intrusion. The courts have found, however, that in exceptional circumstances a warrantless search may be justified.

3. Border Crossings

Searches conducted by customs officers at the border are an example of reduced constitutional protections where the courts find that there is a lower expectation of privacy based on the context. In such cases, the standards established in *Hunter* may not apply.

Section 98 of the *Customs Act*(110) allows an officer to search a person who has just arrived in Canada within a reasonable time of arrival, or a person who is about to leave, if

(109) See *Criminal Code* sections 529 and 529.1.

(110) S.C. 1986 c. 1.

the officer suspects on reasonable grounds that the person has hidden illegal items on his or her person. The Supreme Court of Canada has interpreted this standard as one of reasonable suspicion and not the higher standard of reasonable grounds.(111) A person about to be searched can request to be taken before a senior officer who will make a determination as to whether the search shall proceed. No person is to be searched by a person who is not of the same sex, although if there is no officer of the same sex available, an officer may authorize any suitable person of the same sex to perform the search.(112)

In *R.* v. *Simmons*,(113) the accused was required to submit to a strip search as the result of a customs officer's belief that she was carrying contraband. The Supreme Court's decision acknowledged Canada's right as a sovereign state to control both who and what crosses its boundaries. Even though the search power did not meet the standards that it had set out in *Hunter* (for example, prior authorization and reasonable grounds), the Court stated:

> I accept the proposition advanced by the Crown that the degree of personal privacy reasonably expected at customs is lower than in most other situations. People do not expect to be able to cross international borders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role. Without the ability to establish that all persons who seek to cross its borders and their goods are legally entitled to enter the country, the state would be precluded from performing this crucially important function. Consequently, travellers seeking to cross national boundaries fully expect to be subject to a screening process. This process will typically require the production of proper identification and travel documentation and involve a search process beginning with completion of a declaration of all goods being brought into the country. Physical searches of luggage and of the person are accepted aspects of the search process where there are grounds for suspecting that a person has made a false declaration and is transporting prohibited goods.
>
> In my view, routine questioning by customs officers, searches of luggage, frisk or pat searches, and the requirement to remove in private such articles of clothing as will permit investigation of suspicious bodily bulges permitted by the framers of ss. 143 and 144

(111) *R.* v. *Monney*, (1999) 133 C.C.C. 129 (S.C.C.).

(112) The *Customs Act* also contains many other provisions dealing with powers of customs officers. These are not discussed in this paper.

(113) (1988) 45 C.C.C. 296 (S.C.C.).

> of the *Customs Act*, are not unreasonable within the meaning of s. 8. Under the *Customs Act* searches of the person are not routine but are performed only after customs officers have formed reasonable grounds for supposing that a person has contraband secreted about his or her body. The decision to search is subject to review at the request of the person to be searched. Though in some senses personal searches may be embarrassing, they are conducted in private search rooms by officers of the same sex. In these conditions, requiring a person to remove pieces of clothing until such time as the presence or absence of concealed goods can be ascertained is not so highly invasive of an individual's bodily integrity to be considered unreasonable under s. 8 of the Charter.
>
> I also emphasize that, according to the sections in question: (i) before any person can be searched the officer or person so searching must have reasonable cause to suppose that the person searched has goods subject to entry at the customs, or prohibited goods, secreted about his or her person, and (ii) before any person can be searched, the person may require the officer to take him or her before a police magistrate or justice of the peace or before the collector or chief officer at the port or place who shall, if he or she sees no reasonable cause for search, discharge the person.
>
> In light of the existing problems in controlling illicit narcotics trafficking and the important government interest in enforcing our customs laws, and in light of the lower expectation of privacy one has at any border crossing, I am of the opinion that ss. 143 and 144 of the *Customs Act* are not inconsistent with s. 8 of the Charter.(114)

It is noteworthy that the Court mentioned the problems of controlling illicit narcotics trafficking as a factor in determining that the search was reasonable under section 8 of the Charter.

The fact that those travelling through customs have a lower reasonable expectation of privacy does not, however, diminish the obligation on state authorities to adhere to the Charter, even if the grounds prompting the search are reasonable and drugs are found as a result. Before any search, the inspectors must clearly explain to the subject his/her rights under the Charter – especially the prior right to consult a lawyer – and the right to have the search request reviewed before complying with it, as provided in the *Customs Act*. In *Simmons*, the subject remained ignorant of her legal position because she was not properly informed of these rights. As a result, the Supreme Court of Canada found that the search was unreasonable; even so, the evidence was not excluded because the customs officers had acted in good faith.

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(114) *Ibid.*, at p. 320-321.

The Supreme Court of Canada had held in several cases before *Simmons* that the invalidity of a search power does not render evidence inadmissible if the officers conducting the search believed in good faith that the statutory provisions governing the search were constitutional. In *R.* v. *Greffe*,[115] however, "the inference of extreme bad faith on the part of the police [arising] from their deliberate failure to provide the accused with the proper reason for the arrest" resulted in the exclusion of the seized drug evidence.

In *Greffe*, the RCMP had alerted customs officers in Calgary that the accused was returning to Canada with an unknown quantity of heroin. A visual search of his person was conducted after no heroin had been found in his luggage. He was not advised of his right to consult a lawyer or of his right under the *Customs Act* to have the search request reviewed by a justice of the peace, police magistrate or senior customs officer.

No drugs were found. The suspect was then arrested, informed of his right to counsel, and advised that a doctor would perform a body cavity search at a hospital. During the body cavity search, a condom containing heroin was removed from the accused's anus.

The Supreme Court of Canada found that at the time of the search the police had not had reasonable and probable grounds to suspect the accused had drugs on his person; the informer's tip had not contained sufficient detail for the police to be sure that it was based on more than rumour. The informer had not disclosed the source of his knowledge, and the police had no indication of his reliability. Furthermore, there was confusion about the reasons the accused was given for his arrest. When combined with the lack of advice on the right to consult counsel, the "cumulative effect" of Charter violations was "very serious" and enough to warrant exclusion of the evidence.

The Supreme Court of Canada has since concluded that section 98 of the *Customs Act*, authorizing searches for contraband "secreted on or about" the person, applies to contraband that a traveller has ingested. In *R.* v. *Monney*,[116] the Court concluded that a customs officer who has reasonable grounds to suspect that contraband has been ingested is authorized by the Act to detain the traveller in a "drug loo facility" until that suspicion can be confirmed or dispelled. Although such action amounts to a search for the purposes of section 8 of the Charter,

(115) [1990] 1 S.C.R. 755.

(116) (1999) 133 C.C.C. 129 (S.C.C.).

the Court confirmed that "the degree of personal privacy reasonably expected at customs is lower than in most other situations" and that the search in question was "reasonable for the purposes."

The Court did indicate that the different levels of intrusion raise different constitutional issues (for example, by potentially requiring a higher standard than reasonable suspicion). The Court stated: "the potential degree of state interference with an individual's bodily integrity for searches in the third category requires a high threshold of constitutional justification."(117) The different categories of searches mentioned are discussed later in this paper. The Court went on to discuss how retention in a "drug loo facility" should be characterized:

> Thus the determination of this appeal revolves around the central question of whether a "bedpan vigil" can properly be characterized as an "invasive" procedure on a par with body searches involving the intentional application of force. In my opinion, it cannot. There is no doubt that Canadians expect treatment that recognizes a strong sense of modesty concerning bodily functions. A traveller who is detained in a "drug loo facility" and compelled to produce either urine or a bowel movement under supervision is subject to an embarrassing process. In my view, however, a passive "bedpan vigil" is not as invasive as a body cavity search or medical procedures such as the administration of emetics. In this sense, the right to bodily integrity is not to be confused with feelings of modesty, notwithstanding their legitimacy. Accordingly, a passive "bedpan vigil" is more appropriately analogous to a category two strip search on the basis that a suspect is detained and placed in an embarrassing situation, but is not subjected to an intentional application of force against his or her will.
>
> While I conclude that the compelled production of a urine sample or a bowel movement is an embarrassing process, it does not interfere with a person's bodily integrity, either in terms of an interference with the "outward manifestation" of an individual's identity, as was the central concern in Stillman, or in relation to the intentional application of force, as was relevant in Simmons. As is the case with other investigation techniques in the second category such as a strip search, subjecting travellers crossing the Canadian border to potential embarrassment is the price to be paid in order to achieve the necessary balance between an individual's privacy interest and the compelling countervailing state interest in protecting the integrity of Canada's borders from the flow of dangerous contraband materials. Accordingly, I find that the border search conducted by the customs

(117) *Ibid.*, at p. 152.

> officers in the circumstances of this appeal was reasonable for the purposes of s. 8 of the Charter.[118]

It is clear from these cases that the courts apply a lower standard of constitutional protection for searches at the border than elsewhere. As stated in *Monney*, "decisions of this Court relating to the reasonableness of a search for the purposes of s. 8 in general are not necessarily relevant in assessing the constitutionality of a search conducted by customs officers at Canada's border."[119]

4. Common Law Power of Search Incidental to Arrest

Apart from a few specific provisions such as the one found in the *CDSA*, federal criminal law does not provide authorization for a search of the person. However, the common law does allow a search of the person incidental to a lawful arrest. Thus, such a search is authorized by law, one of the requirements of a reasonable search. Under this power, "a person may only be searched after he has been arrested and then only for the purpose of locating further evidence relating to the charge upon which he has been arrested or to locate a weapon or some article which might assist him to escape or commit violence."[120] As will be discussed, the police power to search as incidental to a lawful arrest is not dependent on reasonable and probable grounds to believe that weapons or evidence will be discovered.

This common law power is an exception to the general rule that a search requires prior authorization to be reasonable. This is a very important exception because most searches of the person are done pursuant to this power. As explained earlier, the *CDSA* does allow a police officer who is executing a search warrant under that Act to search people who are present under certain conditions.

Cloutier v. *Langlois*[121] marked the first time the Court comprehensively considered the question of the existence and scope of the police's power to search a person who has been lawfully arrested. In that case, the appellants were constables employed in Montreal. The respondent, Cloutier, a lawyer practising in that city, was stopped by the constables after he had

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(118) *Ibid.*, at p. 152-153.

(119) *Ibid.*, at p. 151.

(120) The Honourable Mr. Justice R.E. Salhany, *Canadian Criminal Procedure*, Sixth Edition, Release No. 9, November 1998, Canada Law Book, p. 3-48.4.

committed a motor vehicle infraction. When it was discovered that a warrant of committal for unpaid traffic fines had been issued for him, he was arrested and "frisk searched" before being placed in the patrol car. Cloutier subsequently charged the appellants with common assault, contrary to the *Criminal Code*.

The Supreme Court of Canada analyzed the scope of the recognized and long-established common law power of the police to search a lawfully arrested person and seize anything in his or her possession or immediate surroundings in order to guarantee the safety of the police and the accused, to prevent the latter's escape or to obtain evidence. The objectives sought are the safe and effective application of the law.(122)

Following the *Collins* and *Debot* decisions, the Court held that a search will not be wrongful if: it is authorized by law; the law is itself reasonable; and the search is conducted in a reasonable manner. Because a frisk search "is a relatively non-intrusive procedure: outside clothing is patted down to determine whether there is anything on the person of the arrested individual," it "does not constitute, in view of the objectives sought, a disproportionate interference with the freedom of persons lawfully arrested. There exists no less intrusive means of attaining these objectives."(123) It should be noted that the Court indicated that during frisk searches "(p)ockets may be examined but the clothing is not removed and no physical force is applied."(124) Thus, it would appear that different rules might apply to more intrusive searches.

The Court found that although the existence of reasonable and probable grounds is not a prerequisite to the existence of the police power to search, the power is not unlimited. The Court outlined three criteria for establishing a search as reasonable and justified.

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(121) (1990) 53 C.C.C. (3d) 257 (S.C.C.).

(122) *Ibid.*, at p. 274.

(123) *Ibid.*, at p. 278.

(124) *Ibid.*, at p. 277.

1. This power does not impose a duty. The police have some discretion in conducting the search. Where satisfied that the law can be effectively and safely applied without a search, the police may see fit not to conduct a search. They must be in a position to assess the circumstances of each case so as to determine whether a search meets the underlying objectives.

2. The search must be for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused. The purpose of the search must not be unrelated to the objectives of the proper administration of justice, which would be the case, for example, if the purpose of the search was to intimidate, ridicule or pressure the accused in order to obtain admissions.

3. The search must not be conducted in an abusive fashion and, in particular, the use of physical or psychological constraint should be proportionate to the objectives sought and the other circumstances of the situation.(125)

For a search incidental to an arrest to be reasonable, it must satisfy these requirements. The legality of such a search obviously depends on the legality of the arrest. This will mean that the officer will be required to have reasonable and probable grounds to make an arrest as required by the *Code*.

The power of search incidental to an arrest has since been held to extend to the search of a vehicle for the purposes of obtaining evidence against a driver arrested for possession of narcotics. In a four-to-three majority of the Supreme Court of Canada in *R.* v. *Caslake*,(126) the principles governing the common law power of search incidental to an arrest were once again reviewed. In this case, the accused was arrested in his car after a police officer discovered a bag of marijuana in the grass near the roadway. Approximately six hours after the arrest, a police officer searched the car where it had been towed and found cocaine. The officer did not have a warrant or the person's consent to do so. He testified that the search was conducted pursuant to a police policy that required that an inventory be taken of the condition and contents of a vehicle that had been impounded during the course of an investigation. The purpose of the policy was to safeguard the valuables belonging to the owner of the vehicle and to note the general condition

(125) *Ibid.*, at p. 278.

(126) (1997) 121 C.C.C. (3d) 97 (S.C.C.).

of the vehicle. The accused challenged his conviction for possession of cocaine stating that the search of the car was unreasonable.

The majority decision reiterated the three criteria for a search to be reasonable. Because this was a warrantless search, the police had the burden of showing it was reasonable.

With respect to the criterion that the search must be authorized by law, the majority decision stated that there are three ways in which a search can fail to meet this requirement.

- First, the state must be able to point to a specific statute or common law rule that authorizes the search.
- Second, the search must be carried out in accordance with the procedural and substantive requirements the law provides.
- Third, the scope of the search is limited to the area and to those items for which the law has granted authority to search.

In this case, the police relied on the common law power of search incidental to an arrest to provide legal authority. The majority decision reviewed *Cloutier* and stated that this decision requires courts to "balance the state's interests in law enforcement and the protection of the police against the arrested person's interest in privacy in order to determine whether a search was a reasonable and justifiable use of the police power."(127) The decision examined the three limits to the power as stated in *Cloutier*.

The majority decision then went on to discuss the scope of a search incidental to an arrest. "Since search incident to arrest is a common-law power, there are no readily ascertainable limits on its scope. It is therefore the courts' responsibility to set boundaries which allow the state to pursue its legitimate interests, while vigorously protecting individuals' right to privacy."(128) It was stated that the scope of the search can refer to many different aspects, including: items seized (for example, bodily samples cannot be taken incidental to an arrest); the place searched; and temporal limits on the search.

(127) *Ibid.*, at p. 106.

(128) *Ibid.*, at p. 107.

The majority found that "searches which derive their legal authority from the fact of arrest must be truly incidental to the arrest in question."[129] Thus, the search is only justifiable if the purpose of the search is related to the purpose of the arrest. As stated in *Cloutier*, the two main purposes of a search are to ensure: the safety of the police and public; and the protection and discovery of evidence. The following was stated:

> …The restriction that the search must be "truly incidental" to the arrest means that the police must be attempting to achieve some valid purpose connected to the arrest. Whether such an objective exists will depend on what the police were looking for and why. There are both subjective and objective aspects to this issue. In my view, the police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted. Further, the officer's belief that this purpose will be served by the search must be a reasonable one.
>
> *To be clear, this is not a standard on reasonable and probable grounds*, the normal threshold that must be surpassed before a search can be conducted. Here, the only requirement is that there be some reasonable basis for doing what the officer did. To give an example, a reasonable and probable grounds standard would require a police officer to demonstrate a reasonable belief that an arrested person was armed with a particular weapon before searching the person. By contrast, under the standard that applies here, the police would be entitled to search an arrested person for a weapon if under the circumstances it seemed reasonable to check whether the person might be armed. Obviously, there is a significant difference in the two standards. The police have considerable leeway in the circumstances of an arrest which they do not have in other situations. At the same time, in keeping with the criteria in *Cloutier*, there must be a "valid objective" served by the search. An objective cannot be valid if it is not reasonable to pursue it in the circumstances of the arrest.[130]

Thus, the majority decision imposed both a subjective and objective requirement to justify the search. The Court stated that in this case, the right to search the car and the scope of the search would "depend on a number of factors, including the basis for the arrest, the location of the motor vehicle in relation to the place of arrest, and other relevant factors."[131]

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(129) *Ibid.*

(130) *Ibid.*, at p. 108-109.

(131) *Ibid.*, at p. 109.

Chief Justice Lamer summarized the law as follows:

> In summary, searches must be authorized by law. If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest. This means that the police must be able to explain, within the purposes articulated in *Cloutier* …(protecting the police, protecting evidence, discovering evidence), or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the Court to draw a negative inference. However, that inference may be rebutted by a proper explanation.[132]

In *Caslake,* the majority decision found that the search was not justified because its sole purpose was to satisfy the police policy. If the search had been conducted for the purpose of finding evidence which could be used at the trial on the charge of possessing marijuana for the purpose of trafficking, this would have been within the scope of the power to search incidental to an arrest because "there was clearly sufficient circumstantial evidence to justify a search of the vehicle."[133] However, the Court found that the police could not rely on the fact that, objectively, a legitimate purpose for the search existed when that is not the purpose for which they searched. It should be noted that the evidence was not excluded pursuant to section 24(2) of the Charter because the Court found that the evidence was non-conscriptive and thus would not affect the fairness of the trial. In addition, the Charter breach was not considered serious for three reasons: the search was not especially intrusive; there was a reduced expectation of privacy in a car; and the police acted in good faith.

Although the power to search incidental to an arrest is fairly broad, the above cases demonstrate that there is no automatic, unrestricted right to search incidental to an arrest. Another example is a Supreme Court of Canada decision in 1997 that held that the common law power of search incidental to an arrest is not sufficient authority for the seizure of bodily substances for forensic DNA analysis, in the face of a suspect's refusal to provide them. In

(132) *Ibid.*, at p. 110.

(133) *Ibid.*

R. v. *Stillman*,[134] the Court held that the accused's section 8 rights had been violated when hair samples and buccal swabs were seized by the police, under threat of force and without any legislative authority. "These kinds of searches were outside the reasons for the power of search incident to a lawful arrest, because they were not necessary for the protection of the police or public, or to prevent escape, and the evidence was not of a kind that could be destroyed or lost."[135] Because the evidence would not have been discovered without the "conscription" of the accused [as defined by Mr. Justice Cory in *Stillman*] in violation of his Charter rights, the Supreme Court of Canada ruled that admitting the DNA evidence would render the trial unfair.

At the time of the arrest in the *Stillman* case, there was no legislative authority to seize biological samples for forensic DNA analysis, with or without the consent of an accused. Subsequent amendments to the *Code*, however, have set out criteria and a procedure for obtaining prior judicial authorization, in the form of a warrant, for the seizure of bodily substances for DNA analysis. Effective July 1995, the legislation allows the police to use "as much force as is necessary" to execute such a warrant, which can be issued for the investigation of only certain designated offences.

In summary, it is clear that the police have a right to search incidental to an arrest. However, the right is not automatic and is not unlimited. Although the courts do not require reasonable and probable grounds, the police must have a reasonable basis for conducting the search. This should be assessed according to all of the circumstances of the case. The search must be truly incidental to an arrest and must therefore be conducted for a valid objective in pursuit of the ends of criminal justice such as the safety of officers and others.

5. Manner in which Search is Conducted

A review of the cases where search of a person was conducted indicates that the courts will scrutinize the manner in which the search was conducted and may find them unreasonable and exclude any evidence they produce. For example, in *Collins*, a British Columbia case, the accused was sitting in a bar which was said to be frequented by heroin users and traffickers. The accused was seized by two police officers; while one of them used a choke-hold that rendered her semi-conscious, the other forced open her mouth. While this was happening, three caps of heroin dropped out of the accused's right hand. The Court held that the officers in this case

(134) [1997) 113 C.C.C. (3d) 321 (S.C.C.).

(135) Hogg, *Constitutional Law of Canada, supra*, note 62 at p. 45-22.

had not had reasonable and probable grounds to believe that narcotics were in the accused's mouth and that therefore the search was unlawful. The Court went further and determined that to admit the evidence would bring the administration of justice into disrepute, for it would condone and allow the continuation of unacceptable conduct by the police. This decision was affirmed on appeal by the Supreme Court of Canada. This does not mean that a choke-hold will always be considered unreasonable. The following was stated in *R.* v. *Garcia-Guiterrez*[136]: "a choke-hold was used to prevent the evidence from being swallowed and a punch to the solar plexus to force the suspect to cough it up. Subject to a strongly worded dissenting opinion, the majority of the B.C. Court of Appeal held that the choke-hold to preserve evidence was acceptable in the circumstances."[137]

In *Heisler*,[138] a random search of people entering a rock concert disclosed a large quantity of drugs in the accused's possession. The evidence revealed, however, that there had been no grounds upon which to base the search. The Alberta Provincial Court determined that the accused had been subjected to an unreasonable search that went beyond the bounds of mere bad taste and impropriety. The evidence was excluded on the grounds that to admit it would bring the administration of justice into disrepute. In the *Roy* case, however, the Ontario High Court held that where posted signs declare that entry to a rock concert is conditional on submitting to a search, such a search is not in violation of section 8.

In *Debot*,[139] the police received a tip from an informant that the appellant was going to take delivery of a substantial quantity of the amphetamine "speed." He was stopped, ordered from his car, and told to assume a "spread eagle" position and to empty his pockets; speed was found. Although the search was carried out without a warrant, the Supreme Court of Canada held that the police had acted reasonably and that the evidence should not have been excluded as the trial judge had ordered. Chief Justice Dickson said that, although a detainee must be informed of the right to retain and instruct counsel immediately upon detention – a requirement the police had observed in this case – and although the "spread eagle" direction amounted to a detention, the police are not obligated to suspend a search as incidental to an arrest until the detainee has had the opportunity to retain counsel.

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(136) (1991) 65 C.C.C. (3d) 15 (B.C.C.A).

(137) James A. Fontana, *The Law of Search and Seizure in Canada*, Fourth Edition, Butterworths, 1997, p. 396.

(138) (1983), 9 W.C.B. 352 (Alta. Prov. Ct.).

(139) [1989] 2 S.C.R. 1140.

Chief Justice Dickson went on to say that denial of the right to counsel as guaranteed by section 10 of the Charter will result in a finding that a search is unreasonable only in exceptional circumstances. A search is reasonable if it is authorized by law, if the law itself is reasonable, and if the manner in which the search is carried out is reasonable. The denial of the right to counsel does not affect the "manner" in which the search is conducted, which, according to the Court, relates to "the physical way in which it is carried out." The Court also said that "evidence obtained by way of a search that is reasonable but contemporaneous with a violation of the right to counsel will not necessarily be admitted" and, indeed, "evidence will be excluded if there is a link between the infringement and the discovery of the evidence, and if the admission of the evidence would bring the administration of justice into disrepute."

Searches of the person authorized by statute and the common law generally provide no indication as to the scope of the search that can be carried out. As discussed above, one of the requirements of a reasonable search is that it be executed in a reasonable manner. With respect to searches of the person, the level of intrusion may render the search unreasonable.

When discussing body searches in border areas, the Supreme Court of Canada distinguished between three categories of searches:

> It is, I think, of importance that the cases and the literature seem to recognize three distinct types of border search. First is the routine of questioning which every traveller undergoes at a port of entry, accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing. No stigma is attached to being one of the thousands of travellers who are daily routinely checked in that manner upon entry to Canada and no constitutional issues are raised. It would be absurd to suggest that a person in such circumstances is detained in a constitutional sense and therefore entitled to be advised of his or her right to counsel. The second type of border search is the strip or skin search of the nature of that to which the present appellant was subjected, conducted in a private room, after a secondary examination and with the permission of a customs officer in authority. The third and most highly intrusive type of search is that sometimes referred to as the body cavity search, in which customs officers have recourse to medical doctors, to X-rays, to emetics, and to other highly invasive means.(140)

(140) *R.* v. *Simmons*, (1988) 45 C.C.C. (3d) 296 (S.C.C.).

In the *Simmons* case, Dickson C.J.C. went on to add that the different types of searches raise different issues and entirely different constitutional issues "for it is obvious that the greater the intrusion, the greater must be the justification and the greater the degree of constitutional protection."[141] This approach was confirmed in the 1999 Supreme Court of Canada decision in *Monney* discussed above. In both cases, the constitutionality of the third category of searches was left open while the first two categories were held to be reasonable under section 8 even if only based on suspicion. It should be noted that these cases were decided in the context of border searches.

. The Supreme Court of Canada indicated the following with respect to frisk searches in the context of a search incidental to arrest:

> A "frisk" search incidental to a lawful arrest reconciles the public's interest in the effective and safe enforcement of the law on the one hand, and on the other its interest in ensuring the freedom and dignity of individuals. The minimal intrusion involved in the search is necessary to ensure that criminal justice is properly administered.[142]

When a search of the person is justified, a frisk search will generally be held to be reasonable because it is probably the least intrusive means to conduct one.

As discussed above, the *Caslake* decision seems to impose some limits on the type of searches allowed. The following was stated regarding this decision:

> Second, and perhaps more significantly, it seems to restrict the scope of a search incident to arrest. For example, there is no reasonable basis to conduct a strip search of someone arrested for impaired driving unless there is a strong basis for thinking that she is carrying a weapon – doing so will uncover no more evidence on the matter of her guilt or innocence of impaired driving, so it cannot be said in the majority's language that such a search would be incidental to arrest. Obviously, the whole matter of what is "reasonable" raises issues that will have to be settled in future cases.[143]

The Ontario Court of Appeal considered strip searches in *R.* v. *Flintoff*.[144] A police officer arrested the accused at the scene of an accident for impaired driving. Following a

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(141) *Ibid.*

(142) *Cloutier*, *supra*, note 121 at p. 277-278.

(143) Dwight Newman, "Stripping Matters to their Core: Intrusive Searches of the Person in Canadian Law," (1999) 4 *Canadian Criminal Law Review*, 85 at p. 101.

(144) (1998) 126 C.C.C. (3d) 321 (Ont. C.A.).

brief pat-down search at the roadside, the accused was placed in the police car and transported to the police station for the purpose of securing breath samples. The accused was polite and cooperative. The officer observed nothing that aroused any suspicion that the accused had concealed weapons. The accused was strip-searched before the breath tests pursuant to a general police policy requiring all police officers to strip-search every person who was brought into the station in custody, regardless of the circumstances of the case or the individual. The accused never entered the cell area, and the police had no intention of putting the accused in the cells. Thus, the Court had to determine the constitutionality of the police subjecting a person to a strip search prior to permitting the person to respond to a demand for a breath sample.

The Court held that the search was unreasonable and in violation of section 8 of the Charter. The Court stated that the strip search was not justified in law and was not incidental to an arrest. It found the breach was "outrageous" and "flagrant" and that it would shock the public. According to the Court, strip-searching "is one of the most intrusive manners of searching" and "one of the most extreme exercises of police power." Although the police can search incidental to an arrest, "the degree of intrusion must be reasonable and in pursuit of a valid objective such as safety." The police reliance on a general policy with respect to placing prisoners in the cellblock in the circumstances of this case was misconceived because there was no suggestion that the accused was to be held in custody. The Court refused to discuss the validity of the policy in other circumstances. The Court went on to exclude the breath tests, even though they were not obtained as a result of the search, due to the seriousness of the breach.

This case provides a good indication that the courts will not permit strip searches as a matter of routine in the case of a search incidental to an arrest. The Court found that a strip search is one of the most intrusive manners of searching, and that the degree of intrusion must be reasonable and in pursuit of a valid objective.

The Supreme Court of Canada decision in *Greffe* is another example on the limits of the powers to search incidental to an arrest. "In *R.* v. *Greffe*, the Court condemned a rectal search involving sigmoidoscopic probing eight inches into the anal canal of an accused arrested for traffic warrants in the absence of reasonable and probable grounds for conducting such an intrusive and uncomfortable search."(145)

(145) Newman, "Stripping Matters to their Core: Intrusive Searches of the Person in Canadian Law," *supra*, note 143 at p. 103.

Thus, although frisk searches have been found to be a relatively non-intrusive procedure, it is possible that in certain circumstances, the courts may be willing to find that even such a non-intrusive search is unreasonable if not conducted in pursuit of a valid objective. More intrusive searches, such as strip searches, would seem to require additional grounds if they are to be justified. The search must be proportionate with the objective sought, and the purpose must not be unrelated to the objectives of the proper administration of justice. Although the courts have yet to establish clear limits on the scope of searches of the person, it would seem that the "reasonableness" of the search will be reviewed. The courts have stated that it will depend on all of the circumstances of the case. This would probably include such factors as the seriousness and type of the offence involved, the expectation of privacy, the grounds for the search, and the manner in which the search was conducted.

Because of the nature of drug-related offences and the fact that the substance is more easily concealed, it would appear that more intrusive searches may be allowed. In addition, it is important to remember that at the border, a person has a diminished expectation of privacy, and the courts may be willing to allow more intrusive searches than they would allow elsewhere. The courts are certainly aware of the tactics used by offenders to conceal drugs and may be more willing to allow police conduct that would otherwise be unreasonable. It is clear from the decisions, however, that the more intrusive the search, the greater must be the justification and greater the constitutional protection.

6. Electronic Surveillance

Because drug offences are consensual in nature, police often resort to special techniques to investigate these crimes. One of these techniques is the use of electronic surveillance (the interception of telephone conversations and the recording of private conversations). Although surreptitious interception is often used for drug offences, it can also be used for many other serious offences under the *Code* and other federal legislation.(146) The Solicitor General's 1998 annual report entitled *Annual Report on the Use of Electronic Surveillance* states the following with respect to the importance of electronic surveillance as an investigative tool:

(146) See *Criminal Code* section 183.

INVESTIGATION

Electronic surveillance plays a crucial role in the battle against organized crime, especially with respect to the offence of drug trafficking. In curtailing the importation and distribution of illicit drugs in Canada, law enforcement agencies rely heavily upon the interception of private communications. Section III of this report demonstrates that the majority of authorizations granted for by the courts allow for the use of electronic surveillance in relation to trafficking in a controlled substance. As in previous years, many of these authorizations were related to criminal conspiracies, crimes which are difficult for the police to detect, investigate and solve.

DETECTION

Electronic surveillance provides law enforcement agencies with a valuable tool to assist in the detection of crimes that are not the result of the particular complaint. Despite their insidious effects, many of the activities of organized criminal groups would remain undetected were it not for the active investigation of the police. Offences such as money laundering, smuggling and drug trafficking present serious threats to the safety and stability of communities, and the interception of private communications provides a means by which the police can detect, and consequently investigate, involvement in such harmful activities.

PREVENTION

The use of electronic surveillance has led to a number of seizures of large quantities of drugs in Canada. These seizures reduce the amount of drugs available in streets and neighbourhoods, and assist in the prevention of crimes associated with drug abuse. Without this crucial tool, the ability of the law enforcement community to prevent crimes and ensuing social harm would be seriously hindered.

PROSECUTION

Conspiracies and the activities of organized crime groups are often extremely complex and difficult to prove in a court of law. The use of electronic surveillance often provides concrete evidence of the commission of such crimes, which increases the likelihood of conviction for those involved in illicit activities. The prosecution of such offenders increases public confidence in the criminal justice system and contributes to public safety by holding such persons responsible for their actions.

Although it is clear that electronic surveillance is an effective investigative tool, it is also clear that this technique constitutes a dramatic infringement of the right to privacy. The Supreme Court of Canada stated the following:

> The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private. A society which exposes us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning. As Douglas J., dissenting in United States v. White, supra, put it, at p. 756: "Electronic surveillance is the greatest leveller of human privacy ever known." If the state may arbitrarily record and transmit our private communications, it is no longer possible to strike an appropriate balance between the right of the individual to be left alone and the right of the state to intrude on privacy in the furtherance of its goals, notably the need to investigate and combat crime.
>
> This is not to deny that it is of vital importance that law enforcement agencies be able to employ electronic surveillance in their investigation of crime. Electronic surveillance plays an indispensable role in the detection of sophisticated criminal enterprises. Its utility in the investigation of drug related crimes, for example, has been proven time and again. But, for the reasons I have touched on, it is unacceptable in a free society that the agencies of the state be free to use this technology at their sole discretion. The threat this would pose to privacy is wholly unacceptable.(147)

Because electronic surveillance is more invasive of privacy than are regular search warrants, more procedural safeguards are provided in the legislation. The rules regarding electronic surveillance are complex, and the following paragraphs highlight some key points. Part VI of the *Code* sets out different procedures to obtain an authorization depending on whether one of the parties has consented to the interception. When one of the parties has consented, the requirements are not as strict as for obtaining an authorization for surreptitious interceptions. The grounds are similar to those required for an ordinary search warrant. With respect to surreptitious interceptions, the application can only be made by designated enforcement officials. In dealing with such applications, a judge may grant the authorization if satisfied that: (1) it would be in the best

(147) *R.* v. *Duarte*, (1990) 53 C.C.C (3d) 1 (S.C.C.) at p. 11.

interests of the administration of justice to do so; and (2) other investigative procedures have been tried and have failed or are unlikely to succeed or that the situation is urgent. The second requirement does not apply when the offence is related to a criminal organization. The authorization must contain such terms and conditions as the judge considers advisable in the public interest, and the authorization is not valid for a term exceeding 60 days (although it is possible to obtain 60-day renewals if all conditions are met). With respect to criminal organizations, the authorization can be for a term up to one year.

In regards to video surveillance in circumstances where persons have a reasonable expectation of privacy, as authorized by section 487.01 of the *Code*, the authorization procedure just discussed applies with the necessary modifications. Thus, a general warrant for video surveillance requires the same justification as an authorization to intercept private communications.

The *Code* also authorizes warrantless interceptions either in exigent circumstances or to prevent bodily harm (in this case there are restrictions on the use of the evidence).(148) In addition, an emergency authorization may be obtained for up to 36 hours if the urgency of the situation requires interception of private communications to commence before an authorization can be obtained with reasonable diligence under the normal procedure. The admissibility of illegally obtained evidence will be determined under sections 8 and 24(2) of the Charter.

In *R.* v. *Thompson*,(149) the Supreme Court of Canada held that the police cannot indiscriminately bug any and all pay phones the accused may use; this would violate the public's right to be free from unreasonable search and seizure. However, broadly worded clauses in a judicial authorization permitting the bugging of phones at any place to which a suspect may "resort" are valid, provided the police have reasonable and probable grounds for believing that the person actually "resorts to" that place.

The Supreme Court of Canada decisions rendered on 25 January 1990 in the *Duarte* and *Wiggins* cases had a significant impact on policing methods, particularly undercover investigations involving drug and morality offences. In *Duarte*,(150) the Court affirmed that electronic surveillance constitutes a search and seizure within the meaning of section 8. This only

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(148) See *Criminal Code* sections 184.4 and 184.1. Because these are warrantless searches, it is possible that a court may find the search unreasonable. For the search to be reasonable, the conditions set out in the legislation must be reasonable, the conditions must be satisfied, and the search must be conducted in a reasonable manner.

(149) [1990] 2 S.C.R. 1111.

(150) (1990) 53 C.C.C. (3d) 1 (S.C.C.).

occurs, however, where a reasonable expectation of privacy exists. The Court said that unauthorized electronic surveillance and interception "of private communications by an instrumentality of the state with the consent of the originator or intended recipient thereof, without prior judicial authorization, does infringe the rights and freedoms guaranteed by section 8." Until then, it had been legal for the police to intercept such communication, as long as one of the parties to the conversation consented. It is now necessary for a judge to authorize such interception in the same way as interception of an entirely private conversation ("wiretapping") where neither party has given prior consent. The Court also required that there be reasonable and probable grounds, established on oath, to believe that there is evidence of an offence in the place to be searched. Suspicion would not satisfy this requirement.

In *Duarte*, the Supreme Court of Canada said that "the primary value served by section 8 is privacy," which it defined as "the right of the individual to determine when, how, and to what extent he or she will release personal information." Accordingly, "one can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance and to which, in consequence, the protection accorded by s. 8 should be more directly aimed." The Court took the position that it could no longer allow the police an "unfettered discretion ... to record and transmit our words" without prior judicial authorization because this widespread police practice represented an "insidious danger" to the "very hallmark of a free society," namely, the "freedom not to be compelled to share our confidences with others." In *Wiggins*,(151) the use of "body pack" microphones by police was also found to be unconstitutional, for the reasons expressed in *Duarte*. The Duarte decision demonstrates that even if conduct is authorized by legislation, this does not mean that it is reasonable under section 8. The *Code* has since been amended to provide for prior authorization of consent interceptions.

In *Wong*,(152) the Supreme Court of Canada extended even further the protection of the individual from invasion of privacy by the state. The Court held that the accused, by using public notices in restaurants to invite people to an illegal gambling operation in a hotel room, had not opened this operation to the public to the extent that it was no longer a private event. He had therefore not relinquished his protection under section 8 of the Charter. The Court applied the criterion developed in *Duarte*; it held that, although the accused had distributed public notices, these did not connote "tacit consent" to electronic surveillance by the police. Therefore, the gambling

(151) [1990] 1 S.C.R. 30.

operation was still "private" and the unauthorized video surveillance by the police constituted an unreasonable search and seizure under section 8.

In *R.* v. *Wise*,(153) the Supreme Court of Canada had occasion to consider the admissibility of evidence obtained through unauthorized installation and monitoring of an electronic tracking device. After installing a tracking device in the back seat of a car belonging to a "suspected serial killer," the police had followed the accused and obtained evidence to support mischief charges relating to damage of a communications tower worth millions of dollars.

The Court was unanimous in finding that both the installation and subsequent monitoring constituted unreasonable searches, in violation of section 8 of the Charter. However, a four to three majority held that the admissibility of the evidence must be considered in the context of a minimal intrusion of the "lessened privacy interest" attached to the operation of a motor vehicle as well as "the urgent need to protect the community." Because the location of the car at the time of the offence was "real" evidence that would not affect the fairness of the trial, and because the Court of Appeal had found that the police had acted in good faith, the majority of the Court held that admitting the evidence would not bring the administration of justice into disrepute. Relying on the Supreme Court of Canada's earlier decision in *Kokesch*, however, the three dissenting justices would have excluded the evidence, because it was obtained through an illegal trespass knowingly committed by the police.

The Supreme Court of Canada has also considered the procedure for allowing the accused access to confidential "sealed packets" containing legal documents on the basis of which judicial authorization for wiretapping is granted. In *Dersch* v. *Canada*,(154) and *R.* v. *Garofoli*,(155) the Court held that for access to be granted, the accused need only make a request to examine the legal documents in the "sealed packet." Such access is necessary to permit the accused to make a full answer and defence, and in particular, to evaluate whether the wiretapping has been carried out in conformity with section 8.

A number of the issues raised in the aforementioned *Duarte*, *Wong*, *Garofoli* and *Wise* cases were addressed in legislation. As stated, it is possible to obtain an authorization for a

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(152) [1990] 3 S.C.R. 36.

(153) [1992] 1 S.C.R. 527.

(154) [1990] 2 S.C.R. 1505.

(155) [1990] 2 S.C.R. 1421.

consent intercept. In addition, police may intercept private communications, with the consent of the originator or intended recipient and without prior judicial authorization, for the purpose of preventing bodily harm to the person consenting. In addition, the *Code* specifically contemplates judicial authorizations for video surveillance and for the use of electronic tracking devices. Also, it codifies procedure for courts to follow in allowing an accused access to the contents of the "sealed packet," in trials where electronic surveillance has been authorized.

As stated above, with respect to surreptitious interceptions, a judge must ensure that: (1) it would be in the best interests of the administration of justice to do so; and (2) other investigative procedures (a) have been tried and have failed; or (b) are unlikely to succeed; or (c) that the situation is urgent. In 2000, the Supreme Court of Canada in *R.* v. *Araujo*(156) interpreted the second requirement set out in the legislation. It stated that the third branch (c) seems to refer to an emergency situation, while the first branch (a) refers to a true "last resort" situation. These other two branches were not argued before the Court, and the decision concerns the second branch (b). The Court indicated that the standard for this branch was not one of "efficiency" but rather "necessity." The test is: There must be, practically speaking, no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry. In rejecting the "efficiency" standard, the court indicated the following:

> This approach is wrong in law. A standard of "most efficacious" strays far from the text of s. 186(1)(*b*) and the privacy rights that it protects. Such language does not match with the test enunciated above. Indeed, in the end, one might well argue, using such an efficiency standard, that wiretapping should always be available to the police, since it might often help catch more criminals. Such a result would rightly send a chill down the spine of every freedom-loving Canadian. We would replace a standard of necessity with one of opportunity at the discretion of law enforcement bodies. The British Columbia Court of Appeal's test must thus be rejected as inconsistent with the very words of the *Criminal Code*.(157)

In the case at bar, the Court indicated that catching the leaders in a drug ring is never an easy task. This was particularly the case where they used counter-surveillance and behaved in a clandestine fashion. The police efforts had failed despite the use of physical surveillance and search

(156) (2000) S.C.C. 65.

(157) *Ibid.*, at para. 39.

warrants, and there was evidence that the use of informants or undercover agents to infiltrate the ring would be ineffective and potentially dangerous. Thus, the Court agreed that wiretapping was the only reasonable alternative. It is clear that police will have to show why other conventional investigative tools (such as search warrants, undercover agents, surveillance, informants) would not work. The Court indicated that the fact the police were targeting ring leaders supported the argument that this technique was necessary: "Here, the police had more need for wiretapping given that they were trying to move up the chain and catch the higher-ups in the operation. This rightly reinforces the investigative necessity made plain by the affidavit materials."

7. Warrant Improperly Obtained or Executed

In *Caron*,(158) a search warrant was obtained only with respect to stolen traveller's cheques. During the search, no such cheques were found; however, police seized a prohibited weapon, which they had had reason to believe was on the premises when they applied for the search warrant. The Court held that the police should have disclosed the fact that they were looking for a prohibited weapon when they requested the search warrant. "By withholding information from the justice of the peace, and by achieving the desired result on the pretext of being interested only in other unrelated items, the informant was removing the process from the judicial arena." It was held that the warrant obtained did not provide legal authority to conduct the search for the weapon. Similarly, in *Imough*(159) it was learned at trial that the police officers had not had proper grounds for obtaining the warrant. The Court held that to admit the evidence "would shock the conscience of the community and bring the administration of justice into disrepute having regard to the sanctity of a person's dwelling and [the fact] that the search in this case was conducted entirely without legal authority."

Notwithstanding a properly obtained and lawful search warrant, the British Columbia Court of Appeal has excluded evidence resulting from a warrant that was executed in an improper manner. In *R.* v. *West*,(160) the police allowed a television crew to accompany them on the execution of a search warrant that had been obtained on the basis of a media investigation. During execution of the warrant, a television camera crew had followed the police into the accused's apartment and filmed him being arrested and handcuffed. The British Columbia Court of Appeal held that the search was unreasonable "because it exceeded the authority of the

(158) (1982), 31 C.R. (3d) 255 (Ont. Dist. Ct.).

(159) (1982), Can. Charter of Rights Ann. 13-23 (Ont. Prov. Ct.).

(160) December 1997, British Columbia Court of Appeal.

warrant and it violated, for no investigatory or juridical purpose, the highest possible privacy interest of the accused in the security of his residence." Given the seriousness of the Charter breach, the evidence obtained during the search was held inadmissible and a new trial was ordered.

8. Plain View Doctrine

A search warrant only allows a police officer to search the areas and for objects set out in it. The plain view doctrine, however, allows a police officer who is lawfully at a locale to seize items that constitute evidence of a crime. "This is what is really meant by the 'plain view doctrine'; it must be an item which is in the plain view of the officer and something which he has observed during the course of a proper search."(161) The doctrine depends on the officer being lawfully at the locale. The *Code* and the *CDSA* have codified the plain view doctrine with respect to searches under the respective legislation. This doctrine is another example of a warrantless search authorized by law.

In *Shea*,(162) the Ontario High Court followed the "plain view" doctrine cases in the United States in deciding that, once a police officer is lawfully in residential premises, he or she has the right to seize articles such as narcotics that are in plain view.

9. Garbage

In *R.* v. *Krist*,(163) the British Columbia Court of Appeal considered whether police seizure of garbage bags left on the street for collection amounted to unreasonable search or seizure. The police used the presence of marijuana plants and other paraphernalia found in the garbage to obtain warrants to search the appellants' home and vehicle, where additional plants and growing equipment were found. Relying on *obiter* comments made by the Supreme Court of Canada in *R.* v. *Dyment*, the Court of Appeal found that once trash is "abandoned by a householder to the vagaries of municipal garbage disposal," he or she no longer has "a reasonable expectation of privacy in respect of it." Thus, even though its seizure was based

(161) Salhany, *The Police Manual of Arrest, Seizure and Interrogation*, *supra*, note 3 at p. 117.

(162) (1982), 1 C.C.C. (3d) 316 (Ont. H.C.).

(163) (1995) 100 C.C.C. (3d) 58 British Columbia Court of Appeal.

on a tip of unknown reliability, police action did not amount to a breach of section 8 of the Charter.

EXCLUSION OF EVIDENCE UNDER SECTION 24(2) OF THE CHARTER

An in-depth discussion of the caselaw under section 24(2) of the Charter is beyond the scope of this paper. However, because decisions involving the exclusion of evidence may have an incidental impact on police conduct, the general rules set out by the Supreme Court of Canada are discussed here.

The rules regarding the exclusion of evidence have changed since the adoption of the Charter. For example, before the Charter's arrival, "evidence that was obtained as a result of an illegal search and seizure was still admissible against an accused. This is no longer the law."(164)

Section 24(1) of the Charter provides a course of action for accused persons whose Charter rights have been infringed or denied: they can apply to a "court of competent jurisdiction" for the "appropriate and just" remedy. Section 24(2) allows a court to exclude evidence obtained in a manner that infringed or denied Charter rights, if admitting it into evidence "would bring the administration of justice into disrepute." This is important because evidence that has been obtained in breach of the Charter is not automatically excluded. It will only be excluded if its admission would bring the administration of justice into disrepute.

The Supreme Court of Canada has said that relief under section 24(2) is available only to the person whose Charter rights have been infringed. In *R.* v. *Edwards*,(165) the accused asked the Court to exclude evidence in the form of drugs seized from his girlfriend's apartment, allegedly in violation of section 8 of the Charter. Finding that the accused was no more than a "privileged guest," who lacked the authority to admit or exclude others from the apartment, a majority of the Court held that he did not have "a reasonable expectation of privacy" on the premises. Consequently, because his own section 8 rights had not been infringed, he could not contest the admissibility of the evidence pursuant to section 24(2) of the Charter.

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(164) Salhany, *The Police Manual of Arrest, Seizure and Interrogation, supra*, note 3 at p. 112.

(165) [1996] 1 S.C.R. 128.

The causal connection between the breach of an individual's section 10(b) rights and the recovery of evidence was considered by the Supreme Court of Canada in *Black*.[166] During the investigation of a charge of murder, the police recovered the weapon used (a knife) after the appellant had given them a written statement. The Court held that there had been a breach of the appellant's rights under section 10(b), i.e., the police had continued to question her despite the fact she was drunk and despite her clear prior request for the opportunity to consult counsel. For this reason, any evidence recovered thereby and thereafter should be excluded. The requirement under section 24(2) that the evidence was obtained in a manner that infringed a Charter right requires a causal or temporal connection between the breach and the discovery of the evidence.

In *R.* v. *Elshaw*,[167] the Supreme Court of Canada discussed the appropriate test under section 24(2) of the Charter for admission or exclusion of a self-incriminating statement obtained in violation of an accused's rights under section 10(b) of the Charter. The Court held that exclusion of such statements obtained in this way should be the rule rather than the exception. Finding that the evidence had contributed substantially to conviction and that there had been no evidence of any urgency or necessity to obtain information from the accused at the time of detention, the Court ordered the evidence excluded. The majority held that admission of such evidence would "generally" amount to a substantial wrong or miscarriage of justice. For that reason, section 686(1)(b)(iii) of the *Criminal Code* could not be used to correct the errors made by the trial court.

In *Collins*, the Court stated that disrepute involves a consideration of the views of the community at large. The test is whether the admission of the evidence would bring the administration of justice into disrepute in the eyes of the reasonable person, dispassionate and fully apprised of the circumstances of the case.

In *R.* v. *Burlingham*[168] (right to counsel) and *R.* v. *Silveira*[169] (unreasonable search or seizure), the Supreme Court of Canada reviewed the factors previously canvassed in *R.* v. *Collins*, for the exclusion of evidence under section 24 (2). The three primary factors were held to be: "(a) does the admission of the evidence affect the fairness of the trial, (b) how serious

(166) [1989] 2 S.C.R. 138.

(167) [1991] 3 S.C.R. 24.

(168) [1995] 2 S.C.R. 206.

(169) [1995] 2 S.C.R. 297.

was the Charter breach, and (c) what would be the effect on the system's repute of excluding the evidence." The answers to those questions may depend upon a number of factors, including: the nature of the evidence and whether it would very likely have been obtained in some other way; the presence or absence of good faith on the part of the police; and the seriousness of the crime.

With regard to the first set of factors, the Supreme Court of Canada has since weighed the impact of illegally obtained evidence on the fairness of a trial by considering whether the evidence was "conscriptive" or "non-conscriptive."

- Conscriptive evidence exists where the accused is compelled, in violation of a Charter right, "to incriminate himself either by a statement or the use as evidence of the body or of bodily substances it will be classified as conscriptive evidence" (in the case of statements, this includes derivative evidence).
- Non-conscriptive evidence exists where the accused was not compelled to participate in the creation or discovery of the evidence. It is evidence which exists independently of the Charter breach in a form useable by the state.

In *R.* v. *Stillman*,[(170)] the Court held that the admission of conscriptive evidence will render a trial unfair if the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative non-conscriptive means. Because an unfair trial would necessarily bring the administration of justice into disrepute, the Court will, as a general rule, exclude such evidence without further deliberation. If the Crown does demonstrate on a balance of probabilities that the conscriptive evidence would have been discovered by alternative non-conscriptive means, then its admission will generally not render the trial unfair. In this case, the other factors will also be considered. With respect to non-conscriptive evidence, its admission will not render the trial unfair, and the Court will proceed to consider the other factors.

The second group of factors to be considered by the courts concerns the seriousness of the Charter breach. The courts are mainly concerned with the impact the breach has on the accused and the motivations or beliefs of the police. The courts will consider many factors, including whether:

(170) [1997] 1 S.C.R. 607.

- the police acted in “good faith”;
- it was inadvertent or of a merely technical nature;
- there were exigent circumstances;
- the police had reasonable and probable grounds to act in the manner they did; and
- the evidence could have been obtained without the violation.

The third set of factors to be considered concerns the effect on the system’s repute of excluding the evidence. The courts will consider such matters as the seriousness of the offence and the importance of the evidence to the prosecution’s case. If the evidence is essential with regard to a serious offence, it is unlikely to be excluded if the Charter breach was trivial.

In drug cases, the substances themselves will not be considered conscriptive evidence unless they derive from conscripted evidence. Thus, in most drug cases, the evidence will be non-conscriptive, and both the second and third factors must be considered. Some have criticized the way these factors are applied to drug-related offences. For example, Don Stuart stated the following:

> The impression left by these recent Supreme Court and Ontario Court of Appeal rulings, especially in drug cases, is that these Courts seem generally determined not to exclude real evidence found in violation of section 8. These Courts tend to ratchet up the rhetoric respecting the third Collins factor about the seriousness of the offence and the effect on the repute of the system if the exclusion of reliable evidence were to result in acquittals. If this is the major reason for admitting the evidence, it points to an irony and inconsistency with the *Stillman* approach, in that the seriousness of the offence and reliability are *not* relevant factors when evidence is characterized as going to trial fairness. Canadian criminal trials under the Charter are no longer exclusively concerned with determining guilt or innocence and it betrays respect for the Charter to argue a return to the pre-Charter days where police conduct was not a material consideration. Particular abhorrence of drug offences may well have coloured consideration of the second Collins factor so that seriousness of the violation is unduly de-emphasised. The Courts, as guardians of the Charter, should be above the war against drugs. This one category of offences does not require special and reduced Charter standards.(171)

(171) Stuart, “The Unfortunate Dilution of Section 8 Protection,” *supra*, note 90 at p. 90.

If courts are reluctant to exclude evidence, they may be sending conflicting messages to police. Although their conduct will have been found to breach a person's Charter rights, there may be little incentive for the police to adhere to the limits imposed by the courts if there are no negative consequences, i.e., the evidence is not excluded.

Even if the courts do exclude evidence, it is important that the police be informed of the new rules if they are to adapt their conduct.

> The most important element in the process of implementing Supreme Court of Canada decisions is effective communication of information to police. The police must know there has been a decision, what it says, and what they have to do to conform to its requirements. Decisions must be clear in order to meet these goals. Judicial decisions are, by their very nature, vague and ambiguous. This lack of clarity may impair effective implementation before the police receive the information. The decision's transmission may be ineffective if it is distorted en route, does not reach the police directly, or is selectively screened by the person receiving it. Finally, decisions must be consistent. If they are not, police discretion is increased and the Court's goals are less likely to be met.(172)

Other factors affecting how the police will implement court decisions are: adequate resources; the attitude of the police; and the bureaucratic structure.(173)

ENTRAPMENT AND ILLEGAL POLICE ACTIVITY

A. Introduction

This section of the paper will analyze the rules that have been set out with respect to the doctrine of entrapment. In addition, there will be a review of illegal police activity committed in the course of their duties. Although these are separate issues, they are related because they are both based on the doctrine of abuse of process. They are also examples of how the courts establish limits to police investigations. As stated previously in this paper, it has long been recognized that consensual crimes (including drug-related offences) are much more difficult to detect and that special investigative powers may be appropriate. Although police

(172) Kathryn Moore, "Police Implementation of Supreme Court of Canada Charter Decisions: An Empirical Study," *Osgoode Hall Law Journal*, Vol. 30, No. 3, Fall 1992, p. 552.

(173) *Ibid.*, at p. 552-553.

tactics intended to provide a person with the opportunity to commit an offence and illegal police activities are not limited to drug offences, it is fair to state that these tactics are probably more prevalent in investigations of these types of offences.

B. Entrapment

In some cases, police forces use informers (including paid informers) or undercover police agents to obtain information about criminal offences. With consensual offences such as those related to drugs, infiltrating a group and acting as a consensual participant is often the only way for the police to obtain evidence of an offence. They are generally there to observe the suspect and, in some instances, may afford the suspect an opportunity to commit an offence. The police must ensure that the actions of the informer or the undercover agent do not go too far. When police actions are excessive, the accused may attempt to rely on the doctrine of entrapment.

The following quotation details some of the dangers related to entrapment:

> Police entrapment contributes to the commission of a crime as opposed to other police techniques in the course of an investigation after a crime has been committed. Such conduct which artificially propagates and induces crime would risk criminalizing non-predisposed individuals and undermine public confidence in and community respect for the administration of justice.(174)

The leading case in Canada on entrapment is the Supreme Court of Canada's decision in *R.* v. *Mack*.(175) The accused had in the past been convicted of several drug offences but had apparently given up the use of drugs. He was approached by a police informer (a former acquaintance) and repeatedly asked over several months to supply narcotics. The accused indicated that he had no interest in doing so. At one point, they went for a walk in the woods where the informer produced a handgun and was going to show the accused his marksmanship. At this meeting, the informer raised the issue of drugs and made certain comments that the accused perceived as threats. The accused was later asked to telephone the informer but did not do so. He finally met with the informer because he was terrified of him. At the meeting, the

(174) Michael Stober, "The Limits of Police Provocation in Canada," *Criminal Law Quarterly*, Vol. 34, May 1992, 290 at p. 295.

(175) (1988) 44 C.C.C. (3d) 513 (S.C.C.).

accused was informed of a drug syndicate and was shown a large amount of money by an undercover police officer. The accused was asked to obtain a sample of cocaine. He obtained it from a supplier he had known previously. Later, the accused delivered 12 ounces of cocaine to the informer (after further threats). He was charged with possession of narcotics for the purpose of trafficking.

Lamer J., as he then was, delivered the unanimous judgement of the Supreme Court of Canada. He explained that entrapment is not a substantive defence (such as necessity or duress) and indicated that the rationale for this defence is not a lack of culpability in the accused (because the essential elements of the offence will generally be present). Rather, the rationale is based on the need for the Court "to preserve the purity of the administration of justice" and to prevent an abuse of the judicial process. Thus, entrapment is based on the common law doctrine of abuse of process.

> The court is, in effect, saying it cannot condone or be seen to lend a stamp of approval to behaviour which transcends what our society perceives to be acceptable on the part of the state. The stay of the prosecution of the accused is the manifestation of the court's disapproval of the state's conduct. The issuance of the stay obviously benefits the accused but the court is primarily concerned with a larger issue: the maintenance of the public confidence in the legal and judicial process. In this way, the benefit to the accused is really a derivative one.(176)

Thus, the Court is not saying that the accused deserves an acquittal but rather that the Crown is disentitled to a conviction by its abuse of process and that the prosecution should be stayed.

According to Lamer J., entrapment occurs when the conduct of the police exceeds acceptable limits. This is the case in the following circumstances:

- the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry; or
- having a reasonable suspicion or acting in the course of a *bona fide* inquiry, the police go beyond providing an opportunity and induce the commission of an offence.

(176) *Ibid.*, at p. 542.

To establish entrapment, the accused is only required to establish that one of the two branches of the test has been met.

Lamer J. states that "since the doctrine of entrapment is not dependent upon culpability, the focus should not be on the effect of the police conduct on the accused's state of mind".(177) Rather than adopting a subjective approach, what is required is an objective assessment of police conduct. He indicates that with respect to whether or not the police induced the commission of the offence, it would be useful to consider whether the conduct of the police would have induced the average person (and not the particular accused) in the position of the accused into committing the offence.

According to the guidelines set out by the Supreme Court of Canada, the police are required to have a reasonable suspicion that the accused is already engaged in criminal activity, or must be acting pursuant to a *bona fide* inquiry. The rationale for requiring reasonable suspicion is "because of the risk that the police will attract people who would not otherwise have any involvement in a crime and because it is not a proper use of the police power to simply go out and test the virtue of people on a random basis."(178) The conduct of the police is to be judged objectively to the extent possible and it is generally only with respect to the issue of whether the police have reasonable suspicion that the pre-disposition (or past, present or suspected criminal activity of the accused) is relevant. Thus, the accused's pre-disposition is generally only useful in determining whether the provision of an opportunity to commit the offence was justifiable (because a lack of reasonable suspicion may indicate that the police are engaged in random virtue-testing which is not permissible). The Court also indicates that "there must be some rational connection and proportionality" between the crime for which police have a reasonable suspicion and the crime which the police provide the accused with an opportunity to commit. In addition, there must be a "temporal connection" (the conduct of the accused must not be too remote in time). The reasonable suspicion of the police that a person is engaged in criminal activity can be based on many factors and it is not required that one of these factors be a prior conviction. In fact, a prior conviction by itself would generally not be sufficient to ground a reasonable suspicion. The Supreme Court of Canada is of the view the first form of entrapment (lack of reasonable suspicion) "is not likely to occur" based on police practices in Canada at the time of the judgement.

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(177) *Ibid.*, at p. 559.

(178) *Ibid.*, at p. 560.

In summary, although there must be sufficient connection between past conduct of the accused and the provision of an opportunity, the pre-disposition of the accused is not relevant "as regards whether the police went beyond an offer since this is to be assessed with regard to what the average non-pre-disposed person would have done."[179]

In determining whether police conduct goes further than providing an opportunity, a court will assess the following non-exhaustive list of factors:

- the type of crime being investigated and the availability of other techniques for the police detection of its commission;
- whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime;
- the persistence and number of attempts made by the police before the accused agreed to committing the offence;
- the type of inducement used by the police, including deceit, fraud, trickery or reward;
- the timing of the police conduct, in particular whether the police have instigated the offence or become involved in ongoing criminal activity;
- whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;
- whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;
- the proportionality between the police involvement, as compared to the accused, including an assessment of the degree of harm caused or risked by the police, as compared to the accused, and the commission of any illegal acts by the police themselves;
- the existence of any threats, implied or express, made to the accused by the police or their agents; and
- whether the police conduct is directed at undermining other constitutional values.[180]

Lamer J. made the following statement regarding this list:

> The above description of activity is not intended to be exhaustive in terms of possible situations, or conclusive in the assessment of propriety. It is meant only to illustrate that in any number of

(179) *Ibid.*, at p. 559-560.

(180) *Ibid.*, at p. 560.

> situations, the reason why something is "improper" may vary. It cannot be stated that only one reason will be compelling or determinative. The issue of permissibility of police conduct must be considered in light of the totality of the circumstances. It is important to recall at all times the context in which entrapment usually occurs. An understanding of the reality of criminal activity is imperative to the development of a workable doctrine that accommodates the interest of all in society. In this respect, more leeway may be granted to police methods directed at uncovering criminal conduct that is simply not capable of being detected through traditional law enforcement techniques.(181)

The Supreme Court of Canada clearly adopts a contextual approach with respect to the doctrine of entrapment. As was discussed in the introduction to this paper, the preceding statement is another example of the courts recognizing that police should be granted more leeway when it comes to drug and other consensual offences.

The Court went on to state that because the question of unlawful involvement by the state in the instigation of criminal activity is one of law or mixed law and fact, the trial judge – and not the jury – is to resolve the issue of entrapment. This will only be done once the Crown has discharged its burden of proving beyond a reasonable doubt that the accused has committed all the essential elements of the offence. If the offence is not proved, the issue of entrapment is not considered. If the offence is proved, the onus is on the accused "to prove on a balance of probabilities that the conduct of the state is an abuse of process because of entrapment." If the accused succeeds, the remedy is a stay of proceedings and not an acquittal.

The Supreme Court of Canada added that the claim of entrapment is a very serious allegation against the state and that the state must be given substantial room to develop techniques which assist in its fight against crime in society. It is only when the police and their agents engage in conduct which offends basic values of the community that the doctrine of entrapment should apply. The Court indicated that a stay should be entered only in the "clearest of cases."(182) Thus, the accused may have difficulty in proving that there was entrapment. This will only be done if the accused can demonstrate that to compel them to stand trial would violate the community's sense of fair play and decency.

In the case at hand (*R.* v. *Mack*), the Supreme Court of Canada found that an objective evaluation of the conduct of the police leads to the conclusion that it amounted to

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(181) *Ibid.*, at p. 558-559.

(182) *Ibid.*, at p. 567.

entrapment. The Court found that while it appeared the police had reasonable suspicion that the accused was involved in criminal conduct (the first branch), their efforts went beyond providing the accused with an opportunity and induced the commission of an offence (the second branch). Of note is the fact that the Court indicated that with respect to the crime of drug trafficking, the state must be given substantial leeway. This offence "is not one which lends itself to the traditional devices of police investigation." In addition, the Court states that it is a "crime of enormous social consequence which causes a great deal of harm in society generally." The Court adds that "this factor alone is very critical."(183)

However, according to the Court, the police did not appear to have been interrupting an ongoing criminal enterprise, and the offence was brought about by their conduct and would not have occurred absent their involvement. Some of the factors considered by the Court were the fact that the accused testified that he was no longer involved in drugs and the length of time and repeated requests it took before the accused agreed to commit the offence. This would seem to indicate that the police were required to go further than merely providing an opportunity. The most important and determinative factor in this case was that the informer acted in a threatening way. The Court found this conduct to be unacceptable and if the police had to use such tactics, they had gone beyond providing the accused with an opportunity. The average person in the position of the accused "might also have committed the offence, if only to finally satisfy this threatening informer and to end all further contact." Thus, the Court found that the police's conduct was unacceptable and that the doctrine of entrapment applied to preclude prosecution of the accused.

Although the Supreme Court of Canada stated in *Mack* that random virtue-testing will not be permitted because there is a risk of attracting innocent individuals into the commission of an offence, it does make an exception to the requirement to have reasonable suspicion with respect to the individual in the case of a *bona fide* investigation related to an area where it is reasonably suspected that criminal activity is taking place.

> In those cases it is clearly permissible to provide opportunities to people associated with the location under suspicion, even if these people are not themselves under suspicion. This latter situation, however, is only justified if the police acted in the course of a bona fide investigation and are not engaged in random virtue-testing.

(183) *Ibid.*, at p. 69.

> While, in the course of such an operation, affording an opportunity in a random way to persons might unfortunately result in attracting into committing a crime someone who would not otherwise have any involvement in criminal conduct, it is inevitable if we are to afford our police the means of coping with organized crime such as the drug trade and certain forms of prostitution to name but those two.(184)

It is clear that such an exception can apply to known locations of drug trafficking. An example of this can be seen in *R.* v. *Barnes.*(185) The accused was charged with a number of offences, including trafficking in cannabis. An undercover police officer had approached the accused and his friend because they generally fitted the description of persons who may possess and sell drugs. After a short conversation, the accused agreed to sell hashish to the undercover agent. The place where the arrest took place (a six-block pedestrian mall) was a well-known area where trafficking occurred, and the police were conducting what are known as "buy-and-bust" transactions. The accused relied on the defence of entrapment.

The Supreme Court of Canada reiterated the circumstances when entrapment occurs. Because in this case the police did not have reasonable suspicion of the accused's involvement in unlawful drug-related activity, its conduct would amount to entrapment unless it was part of a *bona fide* inquiry. Thus, although the basic rule is that the police may only present the opportunity to commit an offence to a person for whom they have a reasonable suspicion that they are already engaged in criminal activity, there is an exception where the police conduct is part of a *bona fide* investigation directed in an area where it is reasonably suspected that criminal activity is occurring. If the location is defined with "sufficient precision," the police may present any person associated with the area with the opportunity to commit the particular offence. In these circumstances, the police conduct would not be considered to be random virtue-testing.

In the case at hand, the Court found that the police were engaged in a *bona fide* investigation because the police conduct was motivated by the genuine purpose of investigating and repressing criminal activity. They based this on the fact that the police had reasonable grounds for believing that drug-related crimes were occurring throughout the mall area. The Court dealt with the concern that the area was fairly large. In Lamer C.J.'s opinion, the police would not have been able to deal with the drug problem effectively if they restricted their

(184) *Ibid.*, at p. 552-553.

(185) (1991) 66 C.C.C. (3d) 1 (S.C.C.).

investigation to a smaller area. He stated: "Although there were particular areas within the Granville Mall where drug trafficking was especially serious, it is true that trafficking occurred at locations scattered generally throughout the mall. It is also true that traffickers did not operate in a single place. It would be unrealistic for the police to focus their investigation on one specific part of the mall given the tendency of traffickers to modify their techniques in response to police investigations."(186) He does add, however, that in many cases, "the size of the area itself may indicate that the investigation is not a *bona fide* inquiry."(187)

Lamer C.J. then clarifies a statement he made in *Mack*:

> This statement should not be taken to mean that the police may not approach people on a random basis in order to present the opportunity to commit an offence, in the course of a *bona fide* investigation. The basic rule articulated in *Mack* is that the police may only present the opportunity to commit a particular crime to an individual who arouses a suspicion that he or she is already engaged in the particular criminal activity. An exception to this rule arises when the police undertake a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring. When such a location is defined with sufficient precision, the police may present any person associated with the area with the opportunity to commit the particular offence. Such randomness is permissible within the scope of a *bona fide* inquiry.
>
> Random virtue-testing, conversely, only arises when a police officer presents a person with the opportunity to commit an offence without a reasonable suspicion that:
> (a) the person is already engaged in the particular criminal activity, or
> (b) the physical location with which the person is associated is a place where the particular criminal activity is likely occurring.
>
> In this case, the officer approached the accused when he was walking near the Granville Mall. The notion of being "associated" with a particular area for these purposes does not require more than being present in the area. As a result, the accused was associated with a location where it was reasonably believed that drug-related crimes were occurring. The officer's conduct was therefore justified under the first branch of the test for entrapment set out in *Mack*.

(186) *Ibid.*, at p. 9.

(187) *Ibid.*, at p. 10.

> For these reasons, it is my opinion that the officer did not engage in random virtue-testing in this case.(188)

In a dissenting opinion, McLachlin J, as she then was, expressed concern with respect to the proper balance between the "state's interest in repressing criminal activity" and "the interest which individuals have in being able to go about their daily lives without courting the risk that they will be subjected to the clandestine investigatory techniques of agents of the state."(189) She indicates that a "test which does not permit weighing of the infringement on individual freedom and privacy in determining whether entrapment has occurred is to that extent deficient."(190) She indicated that in deciding whether an inquiry is *bona fide*, room must be made for consideration, not only of the police's motive and whether there is crime in the general area, "but also other factors relevant to the balancing process, such as the likelihood of crime at the particular location targeted, the seriousness of the crime in question, the number of legitimate activities and persons who might be affected, and the availability of other less intrusive investigative techniques."(191)

The test as proposed by McLachlin J. is the following: "In the final analysis, the question is whether the interception at the particular location where it took place was reasonable, having regard to the conflicting interests of private citizens in being left alone from state interference and of the state in suppressing crime. If the answer to this question is yes, then the inquiry is *bona fide*."(192) In this case, she would not have found the inquiry *bona fide* because there was no evidence that trafficking was likely to occur at the place and time where the accused was approached. She notes that the mall in question is a fairly large area in downtown Vancouver and points out the diversity of the area (an area with theatres, restaurants, office towers, etc.). It would appear that she might have found the investigation *bona fide* if the area were a more limited one where there was evidence of drug trafficking. A second factor she considered was the impact the investigation could have on law-abiding citizens pursuing legitimate activities. Because of the diversity of the area, she found that "the possibility of this

(188) *Ibid.*, at p. 10-11.

(189) *Ibid.*, at p. 23.

(190) *Ibid.*, at p. 25.

(191) *Ibid.*, at p. 25.

(192) *Ibid.*, at p. 25-26.

undercover operation's interfering with legitimate activities was high."[193] She also indicated that the offence in this case "while not to be condoned, cannot be considered as serious."[194] She indicates that offences involving marijuana and hashish, at least in small amounts, are less serious than offences involving "hard" drugs such as cocaine and heroin. Finally, she indicated that there are alternative investigatory techniques available for this sort of offence (for example, simple observation). Thus, she was of the view that in this case, "the individual interest in being left alone and free to pursue one's daily business without being confronted by undercover police operatives vastly outweighs the state interest in the repression of crime."[195] She seemed concerned with giving the police "carte blanche" to intercept large numbers of law-abiding citizens.[196]

In summary, the key issues with respect to entrapment are whether the police had reasonable grounds or suspicions to target an individual or were acting pursuant to a *bona fide* inquiry. In addition, even if the first branch of the test is satisfied, one must consider whether the police conduct went beyond providing an opportunity by determining whether the tactics used by the police were designed to induce an average person into the commission of an offence. As discussed above, the Supreme Court of Canada has established general principles regarding these issues. It is important to note, however, that with respect to entrapment the "fact situations can vary enormously, which is why, although the general principles are beginning to emerge, their application is not always easy and can lead to disagreement."[197] The courts have indicated that each case must be determined on its own facts, making it difficult to provide more precise rules regarding police conduct.

Although no court has given as detailed a description of "entrapment" as the Supreme Court of Canada in *Mack*, a few decisions have offered some insight into what constitutes entrapment.

The British Columbia Court of Appeal, in *R.* v. *Meuckon*, found that the trial judge erred in failing to examine the situation that existed between the accused and the

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(193) *Ibid.*, at p. 28.

(194) *Ibid.*, at p. 29.

(195) *Ibid.*, at p. 29.

(196) Michael Stober, in "The Limits of Police Provocation in Canada," *supra*, note 174 at p. 338-339, also criticizes the Barnes decision.

(197) Mewett and Nakatsuru, *An Introduction to the Criminal Process in Canada*, *supra*, note 35 at p. 180.

undercover constable in order to determine whether there was entrapment.[198] To determine if there is entrapment, the trial judge must decide if the constable "had induced the commission of the offence by making gifts, by persistent importuning, and by relying on compassion, sympathy and friendship through a fabricated story about failing to gain a job if he did not supply cocaine to his prospective employer's son."[199] As a result, the Court of Appeal allowed the appeal, set aside the convictions, and ordered a new trial.

In similar reasoning, the B.C. Court of Appeal in *R.* v. *Laverty*, indicated that the trial judge was obliged to make a finding of fact if there was evidence of threats, expressed or implied, made by the informant, for threats might be indicators of entrapment.[200]

In *R.* v. *Kenyon*, an officer had arrested the accused after discussion in a pub. The officer was not investigating anyone in that pub that night and the police had no suspicions of criminal activity at or near that location.[201] The B.C. Court of Appeal held that "if the officer was engaged in random testing, a person who responded to the opportunity to commit an offence was entitled to a judicial stay of proceedings, whether his response was a direct one to a direct opportunity offered by the officer or whether it was a derivative response to a derivative opportunity given by the police."[202]

The courts in *R.* v. *Fortin*,[203] *R.* v. *Maxwell*[204] and *R.* v. *Smith*,[205] gave much credence to the fact that the accused had never been involved in trafficking. The courts, in *Maxwell* and *Smith*, further added that the persistence of the police or their agents to become involved was a factor. In *Fortin*, the accused was known as a drug user but was never suspected of trafficking. The accused, in *Maxwell*, had not been engaged in any criminal activity before the police decided to involve her. The Court concluded in *Smith* that the accused was not even a drug user, let alone a drug dealer.

Although the doctrine of entrapment does not permit random virtue-testing (through the requirement of reasonable suspicion of criminality) and thus provides an obstacle

(198) *R.* v. *Meuckon* (1990), 57 C.C.C. (3d) 193 (B.C.C.A.).

(199) *Ibid.*

(200) *R.* v. *Laverty*, [1990] B.C.J. No. 1933 (B.C.C.A.).

(201) *R.* v. *Kenyon*, [1990] B.C.J. No. 2684 (B.C.C.A.).

(202) *Ibid.*

(203) *R.* v. *Fortin*, [1989] O.J. No. 123 (Ont. C.A.).

(204) *R.* v. *Maxwell*, [1990] O.J. No. 399 (Ont. C.A.).

(205) *R.* v. *Smith*, [1995] N.S.J. No. 285 (N.S. C.A.).

for arbitrary police intrusion, the exception in *Barnes* does reduce this protection in the case of *bona fide* inquiries.

C. Illegal Activities

The doctrine of entrapment involves reviewing whether police forces have gone too far in providing a person with an opportunity to commit an offence and whether a stay of proceedings is thus appropriate. As has been discussed, as criminal offenders become more sophisticated, the police have adopted new investigative tools in an attempt to keep pace (including cases where police officers have breached the law while in the performance of their duties). This occurs in drug investigations, for example, when police conducted buy-and-bust operations and reverse sting operations. The question that this raises is whether such conduct leads to an abuse of process such that a stay of proceedings will be granted.(206)

The issue of illegal police activities is based on the doctrine of abuse of process. It is clear that there are similarities to the issue of entrapment which is simply an application of the abuse of process doctrine. In these cases, the courts are concerned not to tarnish their integrity, and to protect the courts' process and the administration of justice from disrepute. The standard formulation of the test for abuse of process is as follows:

> I would adopt the conclusion of the Ontario Court of Appeal in *R.* v. *Young*…and affirm that "there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings". I would also adopt the caveat added by the Court in *Young* that this is a power which can be exercised only in the "clearest of cases".(207)

In *Mack*, Lamer J., as he then was, in determining whether police conduct amounts to entrapment, stated the following:

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(206) Illegal activities by a police officer also raise the issue of whether the police officer may be liable to prosecution. The issue is beyond the scope of this paper.

(207) *R.* v. *Jewitt* (1985) 21 C.C.C. (3d) 7 (S.C.C.) at p. 14.

> Whether the police or their agents themselves commit crimes in the course of efforts to induce another is relevant, but I am not willing to lay down an absolute rule prohibiting the involvement of the state in illegal activity.(208)

The leading case with respect to illegal police activities is *R.* v. *Campbell*.(209) Binnie J. delivered the unanimous decision of the Supreme Court of Canada. The case involved the prosecution of two accused in relation to the offence of conspiracy to traffic in hashish. The police in this case had conducted a reverse sting operation in which undercover officers portrayed themselves as large-scale hashish vendors. One of the officers had contacted the Department of Justice to obtain advice as to the legality of a reverse sting operation. During the operation, the hashish remained under the control of the police at all times. The accused argued that the police conduct was illegal because they had committed the offence of trafficking themselves (the *Controlled Drugs and Substances Act* and the exemption it provides for such police conduct having not yet been passed). They added that this amounted to an abuse of process. The accused had sought, but were denied, access to the legal advice provided by the Department of Justice based on solicitor-client privilege.

The Supreme Court of Canada held that the police activity was prohibited by the *Narcotic Control Act*. While pursuant to the Act the police were allowed to possess narcotics, there was no immunity for the selling of narcotics. The police were not protected by Crown or public interest immunity. According to the Supreme Court of Canada, the police are not immune from criminal liability for acts committed in the course of an investigation, unless this is authorized by legislation. The Court added that the issue should be left to Parliament: "If some form of public interest immunity is to be extended to the police to assist in the 'war on drugs,' it should be left to Parliament to delineate the nature and scope of the immunity and the circumstances in which it is available…".(210) Where alleged illegal police activity is authorized within the legislative scheme, there is no abuse of process issue.

The Supreme Court of Canada added, however, that illegal police activity does not automatically amount to an abuse of process. The legality of police actions is but a factor to be considered, "albeit an important one."

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(208) *R.* v. *Mack, supra*, note 175 at p. 558.

(209) (1999) 133 C.C.C. (3d) 257 (S.C.C.).

(210) *Ibid.*, at p. 282.

In this case, the Supreme Court of Canada allowed the appeal of the accused and ordered a new trial on the issue of abuse of process. The Supreme Court of Canada was of the view that the legal advice should have been disclosed to the accused because it was advice on which the police had claimed to have placed good faith reliance, thus waiving their privilege. According to the Supreme Court of Canada, if the reverse sting operation was launched despite legal advice to the contrary, this would be "weighed differently in the balancing of community values than a Department of Justice opinion to the opposite effect."(211) The Court reiterated that "police illegality does not automatically give rise to a stay of proceedings."(212) The Court added that if the operation was launched despite legal advice to the contrary, this would be an "aggravating factor." It would be up to a trial judge, however, to decide whether a stay of proceedings was warranted in light of all of the circumstances. The Supreme Court of Canada specified that an application for a stay of proceedings depends on the facts of a particular case and that this "case-by-case approach is dictated by the requirement to balance factors which are specific to each fact situation."(213) This case had a number of attenuating factors, including: the police conduct did not lead to any serious infringement of the accused's rights; the police were careful to keep control of the drugs and ensure that none went on the market; and "the acknowledged difficulty of combating drug rings using traditional techniques."

Although this decision may have a significant impact on general law enforcement in Canada, the impact is less severe in the case of drug enforcement. This is because drug legislation was amended to allow police officers to conduct the type of activities that were at issue in *Campbell.* Thus, the issue of illegal police activities will not be discussed in greater detail because of special rules that apply to drug offences.

The *Controlled Drugs and Substances Act* proscribes various activities such as possession, trafficking and manufacturing of drugs, while allowing various regulatory exceptions, for example the importation by licensed dealers and the sale by pharmacists. The Act also allows for the making of regulations dealing with enforcement matters such as exempting police officers from application of the Act on such terms and conditions as specified in the regulations. In addition, the Act allows for the making of regulations "that pertain to

(211) *Ibid*., at p. 299-300.

(212) *Ibid.*, at p. 301.

(213) *Ibid.*, at p. 276.

investigations and other law enforcement activities conducted under this Act by a member of a police force and other persons acting under the direction and control of a member." Thus, the regulations provide a legal framework for specialized enforcement techniques (including buy and bust, and sting operations) and set out the parameters for such activities. The police rely on these regulations for protection against prosecution.

Section 3 of the *Narcotic Control Regulations* authorizes members of police forces to possess narcotics where such "possession is for the purposes of and in connection with such employment." In addition, the *Controlled Drugs and Substances Act (Police Enforcement) Regulations* exempt police officers from the offences of trafficking, importation or exportation and production. The regulations set out the eligibility requirements for the exemption. Different rules apply depending on the source of the drugs. At all times, the individual must be an active member of a police force and must be acting in the course of his or her responsibilities for the purposes of the particular investigation. In certain circumstances, the regulations require the issuance of a certificate to the officer. The regulations deal with a series of other matters, such as:

- who is allowed to issue a certificate;
- exemptions for persons acting under the direction and control of an exempted police officer for the purpose of assisting that officer in the course of a specific investigation;
- revocation of certificates; and
- rules regarding the detention of forfeited substances.

Although Canada's drug legislation is not the only example of police exemptions, this is still rather rare.

> Other provisions in the *Criminal Code* and in customs and excise laws set out exemptions from criminal liability for those engaged in law enforcement for specific activities relating to money laundering, possession of the proceeds of crime, and possession of prohibited or restricted weapons.
>
> Federal legislation also created a number of legal schemes under which peace officers may engage in otherwise unlawful conduct if that conduct has been approved in advance by a judicial officer. Examples of such schemes include wiretap authorizations and DNA warrants.(214)

(214) Government of Canada, White Paper, *Law Enforcement and Criminal Liability*, June 2000, p. 8.

Thus, police are currently shielded by specific legislative exemptions. Although it is clear that the *CDSA* is not the only legislation that provides an exemption, it is obvious that the police do have special powers in relation to drug-related offences that do not apply to all other criminal offences. Following the *Campbell* decision, the government put out a White Paper entitled *Law Enforcement and Criminal Liability*[215] to seek comments and suggestions regarding a proposed general exemption from criminal liability for police officers. The following sets out the rationale for this proposal:

> In many cases, the most effective way to investigate a criminal organization is to use an undercover officer or to engage someone who is already a member of that organization as a covert agent. In the process, it may be necessary for the officers or their agents to involve themselves in activities that would be illegal in ordinary circumstances. For example, undercover officers or agents may be required to traffic in drugs or other contraband in order to "play along" with their criminal targets to maintain their cover. Similarly, as part of criminal probes, they may be required to communicate for the purpose of prostitution, knowingly give a false name, or place illegal bets in gaming houses. As former Supreme Court of Canada Chief Justice Antonio Lamer remarked in *Rothman* v. *R.*, the investigation of crime and the detection of "shrewd and often sophisticated" criminals "is not a game to be governed by the Marquess of Queensbury rules."[216]

The following is a description of the government's proposal:

> The Government's proposal would amend the *Criminal Code* to provide law enforcement officers, and those persons acting under their direction and control ("police agents"), with protection from criminal liability for certain otherwise illegal acts committed during the course of a *bona fide* investigation or other law enforcement duties, as long as certain conditions are met.
>
> This proposal would not put persons involved in law enforcement above the law or give them blanket or unlimited immunity from the law. In all cases, the scope of the exemption would be restricted to reasonable and proportional acts undertaken only for legitimate law enforcement purposes. It would still be possible to bring criminal sanctions against law enforcement officers if they operate outside of the limits of the proposed scheme.[217]

(215) *Ibid.*

(216) *Ibid.*, at p. 3.

(217) *Ibid.*, at p. 6.

The government proposal to provide a general immunity has been criticized. Critics make the following points:

- the need for such legislation has not been established;
- authorizing the police to commit bodily harm is unconstitutional;
- the lack of prior judicial authorization is not acceptable; and
- the draft bill is overly broad with respect to the officers it covers and the type of criminal acts that can be permissibly committed.(218)

CONCLUSION

The common law rules (relating to confessions and entrapment) and the advent of the Charter have allowed the courts to review police conduct and tactics so as to ensure they are acceptable and would not "shock" the community. As many of the cases discussed in this paper have shown, the courts have placed limits on what police are allowed and not allowed to do.

Clearly, Parliament and the courts have recognized that as criminals become more sophisticated, the police must be given more sophisticated tools to fight them. With respect to drug offences (and other consensual offences), additional tools may be required because of the difficulty in investigating these offences. For example, police are allowed to run buy-and-bust and reverse sting operations pursuant to the *CDSA*. There is no doubt that police powers affect rights and freedoms. The goal is to reach an appropriate balance between a person's right to be free from state intrusion and the state's interest in protecting society.

It is clear that courts view the illegal drug trade as a serious challenge. They often mention the sinister nature of the drug trade and the impact it has on society. Courts may be influenced by these concerns when determining where to draw the line with respect to police conduct. They recognize the difficult job police have and are often willing to grant them "considerable latitude." An example of this attitude is the following statement by the Supreme Court of Canada with respect to the selling of drugs: "It is a crime that has devastating individual and social consequences. It is, as well, often and tragically coupled with the use of firearms. This crime is a blight on society and every effort must be undertaken to eradicate

(218) For more details on the criticism, see "Sweeping police immunity slammed by organized bar," *The Lawyers Weekly*, Vol. 20, No. 29, December 1, 2000.

it."[219] In another case, the following was stated: "… this Court must also consider the societal interest in law enforcement, especially with regard to the illicit drug trade. This pernicious scourge in our society permits sophisticated criminals to profit by inflicting suffering on others."[220]

However, as the discussion in this paper indicates, the police are not given "carte blanche" to do what they want to solve a crime. The courts will continue to closely scrutinize police activity so as to ensure that their conduct does not shock the community and in any way detract from the fairness of an accused's trial.

(219) *R.* v. *Silveira*, (1995) 97 C.C.C. (3d) 450 at p. 496.

(220) *R.* v. *Grant*, (1993) 84 C.C.C. (7d) 173.