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— Roadside Detentions and section 10(b)

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Author's Note [1]

1.0 — PREFACE

This issue reviews recent cases that have considered roadside detentions and section 10(b) of the *Charter*.

2.0 — THE CASES REVIEWED IN THIS BULLETIN

(i) *R. v. Sappleton*, 2021 CarswellOnt 416, 2021 ONSC 430 (Ont. S.C.J.)

(ii) *R. v. Stonefish*, 2019 CarswellOnt 19186, 2019 ONCA 914 (Ont. C.A.)

(iii) *R. v. Pham*, 2012 CarswellOnt 17482, 2012 ONCJ 865 (Ont. C.J.)

Other cases mentioned in this issue:

(i) *R. v. Nolet*, 2010 CarswellSask 368, 2010 SCC 24 (S.C.C.)

(ii) *R. v. Sewell*, 2003 CarswellSask 407, 2003 SKCA 52 (Sask. C.A.)

(iii) *R. v. MacDonald*, 2014 CarswellNS 16, 2014 SCC 3 (S.C.C.)

(iv) *R. v. Harris*, 2007 CarswellOnt 5279, 2007 ONCA 574 (Ont. C.A.)

(v) *R. v. Orbanski*, 2005 CarswellMan 190, 2005 SCC 37 (S.C.C.)

(vi) *R. v. Grant*, 2009 CarswellOnt 4104, 2009 SCC 32 (S.C.C.)

(vii) *R. v. Humphrey*, 2011 CarswellOnt 3817, 2011 ONSC 3024 (Ont. S.C.J.)

2.1 — Sappleton

Facts

Gregory Sappleton violated a *Highway Traffic Act* provision. He was stopped as a result by Officer Allison. When Allison checked Sappleton's identity, it was discovered that he was on conditions that he was violating (being within 500 m of a noted address).

At the same time, Allison discovered that there was a Special Interest Police (SIP) notification for Sappleton that indicated he may be in possession of a firearm. Allison called for back-up. The trial judge explained the sequence of events that followed:

> Shortly after Officer Allison made the call, Officer Justin Carosi arrived on scene. PC Allison informed Officer Carosi of the circumstances, and the concern related to a firearm. With the assistance of Officer Carosi, Officer Allison approached

> the driver's side of the Applicant's vehicle and asked the Applicant to exit the vehicle. As the Applicant was exiting the vehicle, Officer Allison advised the Applicant he was being arrested for the breach of recognizance.
>
> After exiting the vehicle, both officers conducted a pat down search of the Applicant. They also asked the Applicant if he had any weapons on his person or in the vehicle.
>
> The Applicant was found to have a satchel containing cannabis in his possession. The marijuana in the satchel was tied in a plastic baggie, and there was additional marijuana in a piece of cellophane wrap. The evidence is unclear as to whether the satchel was zipped closed. Officer Allison asked the Applicant if he had any other drugs in the car. The Applicant stated just the weed and some tobacco.
>
> PC Allison testified that after observing the marijuana in the satchel, he made the decision to search the vehicle. Officer Allison testified that given that the marijuana was easily accessible to the driver, he was authorized to search the vehicle pursuant to the *Cannabis Control Act* (*CCA*).
>
> PC Allison placed the Applicant in his police cruiser and advised the Applicant that he intended to search the Applicant's vehicle pursuant to the *CCA*. PC Allison again asked if the Applicant had anything he should know about in the vehicle. PC Allison then gave the Applicant his rights to counsel. The Applicant stated that he would like to speak with his lawyer. [Paras 13-17].

The officers then conducted a search for additional marijuana pursuant to the *Cannabis Control Act* (*CCA*). During the search a firearm was discovered.

At trial Sappleton sought to exclude the evidence discovered during the search arguing that the search and circumstances surrounding it amounted to breaches of ss. 8, 9 and 10(b).

Ruling

With respect to section 9, the court held that the stop was not arbitrary or otherwise in violation of s. 9. The allegations of racial profiling were rejected. There was a *Highway Traffic Act* violation. The stop was proper.

With respect to section 10(b), the court found that the questioning of Sappleton about the possibility of a weapon in the car, in the circumstances of this case, violated s. 10(b). The court noted (i) that such questioning may be permissible where officer safety concerns are engaged and (ii) that if the questions (in the cruiser) had been directed at the "state of" cannabis in the car it would have been warranted:

> I agree that PC Allison was entitled to ask the Applicant whether he was in possession of weapons on his person. Such questioning is no different than conducting a pat down search on the Applicant and was reasonable in the circumstances.
>
> However, given that the Applicant had already been removed from the vehicle, in my view, it became unnecessary for the officers to make inquiries regarding the presence of any weapons in the vehicle. Any weapons in the vehicle would not give rise to safety concerns given that the Applicant had already been placed under arrest and removed from the vehicle.
>
> This is not to say that in an appropriate case, the police cannot question a person under arrest regarding the presence of weapons in a vehicle where safety concerns are engaged: *R. v. Godoy*, *supra*. Clearly such questioning is authorized for officer safety purposes. The police would also have the authority to search the vehicle incident to arrest provided the search was truly incidental. *R. v. Caslake*, [1998] 1 S.C.R. 51, 1998 CanLII 838 (SCC).
>
> In this case, however, I agree with the Applicant, that this questioning seems to be more of a pretext to further investigate the information gleaned from the SIP regarding a possible firearm in the vehicle. In the circumstances, the officer should have cautioned the Applicant in advance of the questioning.

> After placing the Applicant in the police cruiser, PC Allison again asked the Applicant if he had anything of concern in the vehicle as he intended to search it. Again, in my view, this questioning violated the Applicant's s. 10(b) rights.
>
> There was no imminent threat to the officer's safety at the time of the questions. Moreover, the officer had already made the decision to search the vehicle. The questions were not directed at determining whether a search of the vehicle for marijuana was justified. Had the questions pertained to the state of marijuana stored in the vehicle, they would have been warranted. In my view, the questions here did not have that purpose. Rather, they were directed at questioning the accused regarding the firearm believed to be in the vehicle. [Paras 34-39].

With respect to section 8, the court found that the search violated s. 8 as the officer did not have reasonable grounds to believe there was cannabis that was improperly stored in the vehicle. In coming to this conclusion, the court rejected the notion that the fact the officers may have also been looking for a firearm was, in and of itself, a problem — police are entitled to have dual purposes in mind:

> Police conduct does not become invalid merely because other objectives (investigating crime) may also be in play. In other words, the fact that police were alive to the fact that a firearm may have been located during a search does not invalidate an otherwise lawful search. As explained in *R. v. Nolet*, [2010] 1 S.C.R. 851, 2010 SCC 24 (S.C.C.) (CanLII), at para. 43:
>
> > "the expectation that the search might also uncover drugs" (p. 335) did not convert a *Charter*-compliant regulatory search into a *Charter* violation: *R. v. Sewell*, 2003 SKCA 52 (CanLII), 175 C.C.C. (3d) 242.
>
> However, statutory authority cannot be used as pretext to improperly interfere with *Charter* rights. Police power, whether conferred by statute or at common law, is abused when it is exercised in a manner that violates the *Charter* rights of an accused. *R. v. Nolet*, *supra*, at para. 39. As explained in *R. v. Caslake*, [1998] 1 S.C.R. 51 (S.C.C.), 1998 CanLII 838 at para. 27:
>
> > Naturally, the police cannot rely on the fact that, objectively, a legitimate purpose for the search existed when that is not the purpose for which they searched. The *Charter* requires that agents of the state act in accordance with the rule of law.
>
> [Paras 60-61].

Comment

Sappleton offers a few helpful points of law in the context of the *Cannabis Control Act* (*CCA*), searches and s. 10(b).

With respect to section 10(b), the court found that the questions about weapons constituted a violation of s. 10(b). Two important points should be made here, however. *First*, this violation arose from the fact that officer safety was not in issue at the time of the questioning. In this way, the questions effectively constituted a breach of the duty to hold off. If officer safety had still been a live issue, the questions would have been permissible [paras 33-34]: see *R. v. MacDonald*, 2014 CarswellNS 16, 2014 SCC 3 (S.C.C.). *Second*, questions directed at the cannabis and in relation to a possible *Cannabis Control Act* (*CCA*) search would have been permissible [para 39]. As the court later commented:

> Indeed, if the police had grounds to believe that marijuana was still being stored in contravention of the Act, a reasonable search for the marijuana would have been warranted. *Additional questioning regarding the presence of marijuana and the location and/or manner it was stored would have also been a reasonable exercise of police authority*. In some cases, questioning of this nature may obviate the need for an extensive search. [Para 64].

With respect to section 8, the court recognized that having a dual purpose (searching for the firearm while searching under the *Cannabis Control Act* (*CCA*)) is not problematic, so long as there is a valid reason for the search and it is not otherwise a ruse [paras 60-61]: see *R. v. Nolet*, 2010 CarswellSask 368, 2010 SCC 24 (S.C.C.) at paras. 39 and 43; *R. v. Sewell*, 2003 CarswellSask 407, 2003 SKCA 52 (Sask. C.A.).

2.2 — Stonefish

Facts

Shannon Stonefish was driving near Fort Frances when he was stopped by police. The officer noted that he could not read the licence plate number on the vehicle. During the ensuing traffic stop the officer noted an odour of burnt marijuana coming from the car. The officer also noted that Stonefish appeared nervous and suspected he was under the influence of marijuana.

> When the officer asked about the smell of marijuana, the appellant said that he had smoked some and pointed to a silver metal marijuana grinder in the cup holder of the car. The grinder contained a green leafy substance. The officer then arrested the appellant for possession of a controlled substance. She searched him and found $1,195 in cash in his pocket. She also seized a cell phone from the driver's seat, which was receiving text messages and at least one call during the time that they were in contact. [Para 5].

At trial Stonefish argued that the questions by the officer about the odour of marijuana violated s. 10 and the search violated s. 8. The trial judge rejected those arguments:

> [T]he officer was entitled to follow-up her suspicions concerning the driver's sobriety by asking a question that is the functional equivalent in the circumstances of the unobjectionable, "have you had anything to drink tonight." In this case, "why does your car smell like burnt marijuana?" Mr. Stonefish's answer to that question provided ample grounds for the officer to proceed with an arrest. Concerning the search of the vehicle, it's common ground that the common law power to search incident to arrest extends to motor vehicles. The question before this court concerns the scope of that power to search. The Supreme Court in *Caslake* has made it clear that such a search must be truly incidental to the arrest and that the authority for it arises not because of the reduced expectation of privacy of the arrested individual in a vehicle, but because of the need for law enforcement to gain control of things and information which outweighs the individual's privacy right (See paragraph 17 of *Caslake*). In this matter Mr. Stonefish alleges the search for drugs under the hood of his vehicle was not rationally connected to his arrest for being in possession of a small amount of marijuana and was therefore outside the scope of a lawful search incident to arrest.
>
> The trial judge found that "it was objectively reasonable to search the vehicle for evidence of more controlled substances." He rejected the argument "that looking under the hood of the car was unreasonable, considering the relatively small and unconcealed amount of marijuana initially located." The trial judge concluded "[i]n this particular case popping the hood of the car to check the engine compartment and finding a suspicious package in plain view is not a search carried out in an unreasonable fashion." [Para 8].

Stonefish was convicted. He appealed.

Ruling

On appeal Stonefish argued, *inter alia*, that the trial judge erred in dismissing the *Charter* motion. With respect to the s. 10(b) issue, the court outlined the argument advanced and rejected it:

> Duty counsel renews the *Charter* challenge and argues that the arresting officer made a critical pivot at the moment she detected the smell of marijuana, which changed the situation from a routine traffic stop under the *Highway Traffic Act* into an active criminal investigation. She argues that the officer should have immediately advised Mr. Stonefish of his *Charter* rights and refrained from asking questions of him. She submits that the question asked of Mr. Stonefish: "Why does your vehicle smell like burnt marijuana?" was impermissible. When she knew that he was not licensed, the arresting officer also knew that he would not be driving the car again that night, so that any questions concerning his sobriety were no longer relevant.
>
> In our view the appellant takes too granulated an approach to the situation. It was evolving and it was not unreasonable for the officer, upon smelling the burnt marijuana, to arrest the appellant for possession of a controlled substance. Her

> question was quite natural in the circumstances and did not constitute a *Charter* violation. Indeed, she need not have asked the question since the answer was obvious. [Paras 13-14].

With respect to the s. 8 complaint, the Court of Appeal similarly rejected it:

> Once she arrested the appellant, the officer was free to search him and the vehicle incident to the arrest. The fact that there was a small amount of marijuana in the cup holder led quite naturally to a search for more marijuana elsewhere in the car. That search turned up the cocaine stored in open view that was revealed when the hood was opened. This is not a case in which the officers were using the *Highway Traffic Act* as a pretext for searching the car, as in some of the cases. In this case, the search was not particularly intrusive, nor did it cross any *Charter* lines. [Para 16].

Comment

While this case predates the coming into force of the *Cannabis Control Act* (*CCA*), the court takes a similar approach to questions related to the cannabis. The questions were part of an evolving situation and were not objectionable. Section 10(b) was not engaged.

2.3 — Pham

Facts

Tai Pham was in the back seat of a vehicle that was stopped by Cst Harrop. The court found the following as the essential facts to the *Charter* issue — a complaint that the officer violated Pham's rights under s. 10(b):

> • P.C. Harrop initially saw what he believed to be young men (perhaps underage) in front of a liquor store passing cases of beer to the front of the car;
>
> • The accused and another male were drinking beer in the rear of the car when the car left the LCBO;
>
> • P.C. Harrop stopped the car using his lights;
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> • When P.C. Harrop first stopped the car he could detect movement from two occupants in the rear seat;
>
> • When P.C. Harrop first approached the passenger side of the car, he asked the occupants if they had been drinking the beer that had been purchased at the liquor store;
>
> • Cases of beer and some partially consumed cans of beer were handed over to P.C. Harrop by the front passenger;
>
> • P.C. Harrop could smell marihuana and asked questions relating to marihuana and was told that there were roaches in the ashtray;
>
> • P.C. Harrop asked for identification from all of the occupants;
>
> • P.C. Harrop then returned to his cruiser with this identification;
>
> • P.C. Harrop returned to the car and directed the parties to get out of the car so he could search it because he believed he had the authority to search the car pursuant to section 35 of the *Liquor Licence Act*,
>
> • P.C. Harrop discovered a backpack on the rear passenger seat;
>
> • The accused had placed his backpack on the rear passenger seat between him and another male;
>
> • P.C. Harrop brought out the backpack and asked the group of males: "Who owns the gym bag?"
>
> • The accused told P.C. Harrop that he owned the gym bag;

- P.C. Harrop opened up the gym bag because he believed there could be alcohol in the gym bag and he had the authority to search the bag pursuant to the *Liquor Licence Act*;

- When P.C. Harrop opened the bag, he found a Tupperware container with five baggies of marihuana in it;

- That P.C. Harrop's sole purpose for conducting a search of the car and the backpack was to find more liquor. [Para 8].

At trial Pham complained that he was detained and his rights under s. 10(b) were violated by Cst Harrop.

Ruling

The court identified the following principles that should govern the determination of whether a detention arose:

- I must focus on police conduct in context of surrounding legal and factual situation and how that conduct would be perceived by a reasonable person;

- Subjective intentions of police are "not determinative";

- The circumstances giving rise to encounter must be examined; this includes at one end of the spectrum looking at the police providing general assistance, or at the other end of the spectrum singling out person for focused investigation;

- I must look at the nature of the police conduct: language used; any physical contact; location of interaction; presence of others; duration of encounter;

- Detention for constitutional purposes, means suspension of an individual's liberty interest by significant physical or psychological restraint. [Para 12].

Applying these principles, the court found that when Cst Harrop directed the males to get out of the car they were detained within the meaning of s. 10(b) [para 10]. The court detailed this finding as follows:

- that the initial traffic stop was made in a rural area; in fact, P.C. Harrop admitted that he wanted the traffic stop to happen outside of the busy area and about 12 kilometres from the LCBO;

- after the initial alcohol was seized, the identification of all occupants was seized from the accused and there is no evidence that it was ever given back to the accused after he returned from the police cruiser;

- there was an explicit direction made by P.C. Harrop to all of the occupants that they get out of the car;

- the accused testified that he felt he had no choice but to answer questions because P.C. Harrop seemed to be the man "in charge";

- the accused was a young man at the time, about eighteen or nineteen at the time of the stop. [Para 13].

Given the accused was detained when he was directed to get out of the car, the informational component of s. 10(b) arose [para 14]. While there are limits on the right to counsel in the context of a *Highway Traffic Act* stop (see *R. v. Harris*, 2007 CarswellOnt 5279, 2007 ONCA 574 (Ont. C.A.) at para. 47), here, once the police asked the accused to step out of the car, any *Highway Traffic Act* investigation was at an end and the police intended to search the vehicle under the *Liquor Licence Act* — this engaged s. 10(b) [para 16].

Comment

Pham offers a helpful example of the progression of roadside detentions and when s. 10(b) is engaged. It is clear from the outset that, in addition to any *Highway Traffic Act* concerns, the police were investigating possible *Liquor Licence Act* violations.

It was not, however, until that investigation solidified in the form of grounds for a search that s. 10(b) engaged — the usual suspension was lifted.

3.0 — Epilogue

The cases discussed above and those cited therein reveal the following principles related to roadside detentions and s. 10(b). *First*, s. 10(b) arises upon arrest or detention — the police must advise the detainee of their right to counsel (informational component): *R. v. Orbanski*, 2005 CarswellMan 190, 2005 SCC 37 (S.C.C.); *R. v. Grant*, 2009 CarswellOnt 4104, 2009 SCC 32 (S.C.C.).

Second, during a roadside stop by police, while detention may arise (at least for the motorist), the obligation on police to advise a detainee of the right to counsel under s. 10(b) may be suspended. This suspension will arise if the police are investigating impaired operation, a *Highway Traffic Act* violation, or conducting an investigation under the *Liquor Licence Act* or *Cannabis Control Act* (*CCA*). Put differently, any s. 10(b) violation is saved by s. 1 during such investigations: *R. v. Humphrey*, 2011 CarswellOnt 3817, 2011 ONSC 3024 (Ont. S.C.J.) at paras. 108-114; *Harris* at para. 47; *Sappleton* at paras. 39 and 64; *Stonefish* at paras. 13-14; *Pham*.

Third, during such a detention questioning about weapons may be permissible if the police have grounds to be concerned about officer safety: *Sappleton*; *MacDonald*.

Fourth, this suspension of s. 10(b) will lift once the police have formed grounds (for an arrest or a search): *Pham*.

Fifth, legitimate searches conducted under the *Liquor Licence Act* or the *Cannabis Control Act* (*CCA*) are not invalidated because the police may have other interests in conducting the search: *Sappleton* at paras. 60-61; *Nolet* at paras. 39-43; *Sewell*.

Footnotes

1 Assistant Crown Attorney in Ottawa and creator of, and chief blogger at Mack's Criminal Law. The views and opinions expressed herein are those of the author and do not represent those of the Attorney General or the Crown Attorney's office.