



**COMMISSION FOR PUBLIC COMPLAINTS AGAINST THE RCMP**

**CHAIR'S REPORT ON A PUBLIC INTEREST INVESTIGATION**

*RCMP Act*  
Subsection 45.43(3)

Complainant:

British Columbia Civil Liberties Association

File No.: PC-2008-1800

JAN 23 2009

Canada

## CHAIR'S REPORT ON A PUBLIC INTEREST INVESTIGATION

### OVERVIEW

In preparation for the Canada Day celebrations of 2008, the West Shore RCMP Detachment in British Columbia, working with the Victoria Police Department (VPD), other police agencies and B.C. Transit, developed an operational plan to respond to what had occurred on Canada Day in recent years. The objectives of the plan were to respond in a proactive way to what had become a civic event mired in excessive liquor consumption and vandalism on the part of some attendees. Ms. Zelda Sun complained that she had been searched by West Shore RCMP members on July 1, 2008 without the requisite grounds to do so.

On July 8, 2008, the British Columbia Civil Liberties Association (BCCLA) lodged a complaint (**Appendix A**) with both the Commission and with the Office of the Police Complaint Commissioner of British Columbia (OPCC) stating, in part:

According to a witness report, municipal and RCMP initiated random and non-consensual searches of people to search for alcohol. These searches were carried out in numerous places throughout Victoria, but apparently public transit and transit exchanges were targeted. It appears that many or all of the buses travelling to downtown Victoria were stopped, and passengers were made to exit for mandatory searches. All alcohol, including closed bottles, was apparently seized.

The complaint went further to state that the BCCLA complains that (a) "police forces in Canada do not have the legal authority to initiate random or mandatory searches such as those that occurred in Victoria," and (b) "police forces in Canada cannot seize property without legal authority. While alcohol cannot be consumed in a public place, there is no law prohibiting people from carrying closed containers of alcohol."

Upon examining the complaint, I considered that due to the public policy issues involved it was advisable in the public interest to have the Commission conduct a "public interest investigation" into the matter pursuant to subsection 45.43(1) of the *RCMP Act*. This meant that the Commission would investigate the complaint in the first instance instead of having the RCMP conduct an investigation on its behalf.

For the reasons expressed below, I find that although the goal of the police in this case is laudable, unfortunately, it appears that in the main these searches, such as in the case of Ms. Sun, were not genuine consent searches and accordingly were not authorized under the B.C. *Liquor Control and Licensing Act*,<sup>1</sup> the *British Columbia Transit Act*<sup>2</sup> and the *Transit Conduct and Safety Regulation*,<sup>3</sup> or general common law police powers. If such searches are to contribute to the security necessary for this civic celebration to continue in the future, they must be given some legislative authority that is justifiable under the *Canadian Charter of Rights and Freedoms*

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<sup>1</sup> R.S.B.C. 1996, c. 267.

<sup>2</sup> R.S.B.C. 1996, c. 38.

<sup>3</sup> B.C. Reg. 377/85

(Charter). I also find that the RCMP members did not keep detailed notes of their participation in the Canada Day events.

In light of my findings, I recommend that until such time as the required legislative bases are put in place, the RCMP's participation in preventative and early interdiction liquor strategies be limited to police presence, and searches only be conducted when the RCMP members have the requisite grounds under the applicable legal authority. Furthermore, I recommend that, consistent with policy, RCMP members take contemporaneous notes and document their actions thoroughly.

## COMMISSION'S INVESTIGATION OF THE COMPLAINT

It is important to note that the Commission for Public Complaints Against the RCMP (Commission) is an agency of the federal government, distinct and independent from the RCMP. When investigating a complaint, the Commission does not act as an advocate for either the complainant or RCMP members. Rather, its role is to inquire into complaints independently and to reach conclusions after an objective examination of the information provided and available to it.

It should be noted that given the participation of the VPD and other municipal forces, the BCCLA's complaint was also lodged with the OPCC. My mandate obviously allows for me to comment on the conduct of the RCMP members and to make findings and recommendations in this respect to the Commissioner of the RCMP. Following exchanges with the OPCC and the Victoria Police Board (Board), it was decided that given the need for consistency in the reviews of the RCMP and the VPD and any recommendations resulting therefrom, a harmonized approach (i.e. between the Commission, the OPCC and the Board), rather than a disjointed one, would be most beneficial.

It was also agreed that the harmonized approach, which recognized the Commission as a "public body" pursuant to section 63.1 of the B.C. *Police Act*, would allow me to provide the summary of the facts and an opinion regarding the legality of the actions of the VPD to the Board for its consideration and any further action that it may deem appropriate. It goes without saying that any decision regarding the propriety of the VPD's policies and procedures will be solely pursuant to the applicable provisions of the B.C. *Police Act*.

It was agreed that a senior former (non-RCMP) police officer would conduct an investigation on behalf of the Commission, the OPCC and the Board. Consequently, the Board, pursuant to section 63.1 of the B.C. *Police Act* appointed the Commission to conduct an investigation into the complaint and report back to the Board pursuant to the provisions of the *Police Act*. The letter directed the Commission, in part, to conduct a detailed review of the policies and procedures employed by the VPD in relation to the Canada Day events; with the assistance of a member of the VPD, gather the applicable VPD policy, operational plan and other documents relevant to Canada Day activities; and if deemed advisable and necessary, conduct interviews with members of the VPD.<sup>4</sup>

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<sup>4</sup> The Commission has provided a separate report directly to the Board.

The investigation conducted by the Commission's investigator consisted of a review of all relevant documents including policing policies and the relevant planning documents for the Canada Day events, interviews with witnesses, interviews with members of the RCMP and the VPD, as well as a review of the execution of the policies and operation plans relating to the search and seizures. Furthermore, in light of the legal implications regarding the searches conducted by the police during the Canada Day celebrations, a thorough legal opinion (**Appendix B**) was obtained regarding the examination of bags carried by pedestrians and bus passengers—the subject of the complaint by the BCCLA.

My findings and recommendations regarding the RCMP's participation in the Canada Day events in Victoria, B.C. are based on a thorough review of the following: the complaint of the BCCLA in relation to the events of July 1, 2008; a statement provided from a witness to this event; the RCMP Operational Plan and related documents (**Appendix C**); the VPD Operations Plan anticipating RCMP participation; relevant sections of the B.C. *Liquor Control and Licensing Act*; correspondence from the B.C. Transit regarding coordination with West Shore RCMP and transit bus logs; the investigation report prepared by the Commission's investigator; the legal opinion, as well as all other relevant documentation. I would like to thank the RCMP for their full cooperation in the conduct of this public interest investigation.

## FACTS

It is well known that the Canada Day fireworks celebrations in Victoria have developed a history of excessive liquor consumption leading to assaults, injuries, vandalism and damage. To address this, the VPD with the assistance of the RCMP and other municipal police forces have developed a strategy of early liquor interdiction based, among other things, on searches of bags and backpacks that might contain liquor.

The West Shore RCMP Detachment was to support the VPD in preventing liquor and inebriated persons from boarding buses bound for the downtown area, both to limit liquor-related problems in Victoria as well as to prevent destruction of buses, annoyance of other passengers, and for safety reasons.

The VPD Operations Plan for this event called for the involvement of a number of police officers from Victoria and the surrounding communities, including 14 from the West Shore RCMP Detachment. The VPD Operations Plan envisioned a multi-pronged, preventative program that included three zones of enforcement. The first was at the outskirts of the City of Victoria and would involve the outlying police agencies checking individuals at public transit facilities in order to prevent liquor consumption and intoxicated persons from taking transit to downtown Victoria. This was the task agreed to by the West Shore RCMP Detachment and the Operational Plan was developed to support this objective. The task of policing the bus interdiction points (the second zone of enforcement) and the City of Victoria (the third zone of enforcement) was the responsibility of the VPD working with a joint RCMP-municipal police traffic unit, other non-RCMP police agencies and B.C. Transit.

The West Shore RCMP Detachment was responsible for the bus terminals in Langford. These terminals were situated at the Juan de Fuca Recreational Centre and the West Shore Town Centre. The detachment was also responsible for its own parks and venues for Canada Day celebrations. The West Shore RCMP Detachment polices four communities; Colwood, Highlands, Langford, Metchosin and two Aboriginal communities, the Songhees and Esquimalt First Nations. RCMP members were to check individuals boarding buses for liquor and prevent inebriated people from boarding the buses.

Ms. Sun was a witness to the events of July 1, 2008, both at the West Shore Mall bus exchange and later in the City of Victoria. During her interview with the Commission's investigator, she stated that she was going to attend an outdoor concert in the downtown Victoria area. This was Ms. Sun's first attendance of a Canada Day celebration in Victoria. Ms. Sun's first encounter with the police was at the West Shore Mall bus exchange where she had gone to board bus no. 8034 on Route 11.

At approximately 6:00 p.m. that day she was about to board her bus when she was stopped by two male RCMP members who asked to look into the bag she was carrying. Ms. Sun acquiesced to the request and following a search of her bag she boarded the bus. During this period of time she saw RCMP members search the bags and packsacks of approximately 20 other people waiting to board buses. Ms. Sun saw some beer on benches that she believes was seized and provided the Commission's investigator with a picture in which we can see what appear to be people being searched prior to boarding the bus and beers on a city bench. Ms. Sun indicated that she did not hear any conversation between the RCMP and the individuals being searched, nor did she see anything that appeared to be confrontational.

At that time Ms. Sun was not overly concerned about the searches that had been conducted by the RCMP members. Ms. Sun explained that she became upset when she was searched a further two times while on the bus and in downtown Victoria by members of the VPD. Ms. Sun expressed her frustrations and concerns with the fact that she was searched a total of three times, when she was alone, had not been drinking liquor, and was acting in every way as a law-abiding citizen.<sup>5</sup>

The Commission's investigator also interviewed the Acting Manager, Operations, B.C. Transit, who was responsible for the B.C. Transit operations on July 1, 2008. There were eight transit supervisors on duty on this day and they were situated at various bus check points. The Acting Manager explained that the bus drivers with problematic passengers could call ahead to their supervisors and police would meet the bus to deal with them. According to B.C. Transit logs, this occurred once with the West Shore RCMP where a group of drunken males were removed from a bus. Fifteen to twenty buses were taken out of service for damage or to clean up vomit during this event. When asked how the bus drivers felt about this day he stated they were very nervous, as this had become a party weekend and accordingly people were unpredictable. The contrast with B.C. Day (August 4, 2008) was very noticeable, as apparently B.C. Transit had virtually no problems with rowdyism on that holiday.

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<sup>5</sup> A detailed account of Ms. Sun's interaction with the VPD, as well as that of another witness who did not want to be identified, which is contained in the Commission's investigative report, will be provided to the Board and the OPCC, but are not required for our purposes regarding the complaint made against RCMP members.

The Acting Manager provided a copy of the signs posted on buses for Canada Day. The signs warned passengers: "To ensure everyone's safety on July 1, customers are reminded that consumption of liquor or open liquor on board buses is not tolerated. At BC Transit's request, police will monitor all buses entering downtown to enforce this safety regulation." (**Appendix D**)

The Acting Manager also provided a copy of the letter, written by the Vice-President, Customer Service & Corporate Secretary for B.C. Transit, sent to each police agency involved in policing Canada day. This letter outlines the position of B.C. Transit in relation to people drinking liquor on buses and acting inappropriately thereon and requests police assistance in boarding its buses when asked to do so in order to enforce these regulations.

The RCMP Operational Plan and associated documents indicate that the purpose of the RCMP participation was to interdict liquor being taken to the downtown area of Victoria and to prevent intoxicated and rowdy people from damaging public transit and interacting with other passengers.

This is mirrored in the VPD Operations Plan, of which members of the RCMP West Shore Detachment were a component, in that they were the first "ring" of interdiction of liquor into the Canada Day festivities. The VPD plan was the result of a collaborative meeting, and experience in previous Canada Day events, and envisioned three rings of policing around the downtown area. The first ring would be bus terminals in the suburbs, where police would be assigned to check people with bags/packsacks boarding buses and stop inebriated people from boarding. The second ring would consist of designated bus roadblocks where drivers of buses with problem passengers could stop for assistance. The third ring was a series of roving patrols and bicycle officers who would patrol the fireworks barricaded venue and the downtown core of Victoria.

The RCMP Operational Plan encouraged preventative policing and assistance to the neighbouring jurisdictions. It also provided for policing of venues in the detachment area where celebrations were taking place. The RCMP Operational Plan stated:

Last year West Shore Detachment worked hard to prevent liquor laden youth and rowdies from boarding BC Transit buses. In the past there have been numerous issues with youth and alcohol, especially when they arrived at the downtown core of Victoria. The effort put forth last year brought praise from both BC Transit and Victoria PD. It is the goal of West Shore Detachment to continue this high standard of preventative policing and assist our neighboring jurisdictions. Along with this preventative effort, West Shore members will be tasked with patrolling the beaches [...] to ensure this night remains "family" friendly.

On September 23, 2008 during a telephone conversation with the Commission's investigator, Staff Sergeant Mike Legassicke advised that e-mails to RCMP members had not solicited any voluntary response in relation to the disposing of liquor or dealings with the public. Anecdotal evidence was that most liquor was seized from juveniles and was disposed of at the scene. The RCMP had no reports of citizens complaining about liquor being taken from them in relation to this event.

In a further written exchange between the Commission's investigator and Staff Sergeant Legassicke, the latter advised that there is an expectation that RCMP members should be able to articulate the grounds under which they conduct their searches.

Staff Sergeant Legassicke also informed the Commission's investigator that any liquor seized would have likely been destroyed at the scene and it would be unlikely that any notes were made concerning the destruction of this liquor. Staff Sergeant Legassicke indicated that he had been informed that almost every liquor seizure involved a minor that was found in possession contrary to the B.C. *Liquor Control and Licensing Act*. Furthermore, he informed the Commission's investigator that to date the RCMP detachment had not received any requests for the return of liquor seized on Canada Day.<sup>6</sup>

Further to these written questions, a report submitted by three RCMP members on their activities at Canada Day revealed minimal contact with the bus depots but much seizure of liquor and marijuana at other open-air venues. The report includes the following: youths drinking at a skateboard park, rum and beer dumped out; 20 beers found in the Langford parkway and dumped out; 26 oz. bottle of rum seized from an 18-year-old female and dumped out; female writing graffiti on the bridge at Langford Lake; backpack containing half a pound of marijuana found at Langford Lake; 12 beers dumped out from juveniles drinking on the beach; youth caught smoking marijuana, paraphernalia disposed of; check of bus stop, rowdy passengers but no trouble.

With the exception of this report, the only other "report" is an RCMP briefing note, provided to the Commission on July 23, 2008, which described the West Shore Detachment's actions on July 1, 2008. The briefing note stated that the two bus terminals were targeted in the early evening hours as people travelled towards Victoria, and later as they returned. Liquor use was prevalent in the later runs. The briefing note further mentioned that some people were checked for liquor as they boarded buses and some searches of backpacks, qualified as consensual, were conducted. According to the RCMP briefing note, no buses were emptied and searched and no systematic search of commuters was conducted. A small amount of open liquor was poured out at the scene. The day was described as uneventful from a policing standpoint. It should be noted that a note in the B.C. Transit log said that at 9:14 p.m. at the Langford exchange seven people were removed from the bus by the RCMP and liquor seized.

RCMP documents were requested to determine if any liquor had been seized and placed in the property office, or B.C. *Liquor Control and Licensing Act* offences forwarded for prosecution. There were apparently no reports on file in regards to either issue.

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<sup>6</sup> Section 70 of the *Liquor Control and Licensing Act* permits filing a request for the return of liquor.

## ANALYSIS

At the outset it should be noted that no other complainants or witnesses came forward to the Commission regarding the actions of the RCMP members on Canada Day. This, coupled with the absence of notes by the members, posed some challenges in assessing how the searches were actually conducted and on what basis the RCMP members relied to conduct their searches and seize liquor.

That being said, the broader and more important issues to be considered are in regard to the authorities that the RCMP members relied upon to conduct their searches.

### *Lack of note taking*

Before addressing the aforementioned issues, I would like to comment on the lack of note taking by RCMP members during this joint operation with the VPD. The “E” Division (British Columbia) RCMP Operational Manual, section 100.5, subsection 7.1.2 directs a member who tells a citizen to destroy liquor with consent (i.e. to pour out a bottle of beer), to note this fact along with the name of the citizen and the brand of liquor in their notebook. An e-mail was sent out to all members of the West Shore Detachment soliciting any information on seizures. Three members submitted one report but requests from all other members on duty elicited no response, indicating no one had a notation in their notebook. This obviously is inconsistent with the RCMP policy and with good police practice.

**FINDING: The lack of note taking by members of the West Shore RCMP Detachment is inconsistent with RCMP policy.**

**RECOMMENDATION: I recommend that in the future RCMP members properly document each case when liquor is seized and destroyed.**

### *Legal authority to conduct searches and seizures of liquor*

In its complaint the BCCLA indicated that “police forces in Canada do not have the legal authority to initiate random or mandatory searches such as those that occurred in Victoria,” and (b) “police forces in Canada cannot seize property without legal authority. While alcohol cannot be consumed in a public place, there is no law prohibiting people from carrying closed containers of alcohol.”

As previously stated, the RCMP was a component of the VPD Operations Plan. The VPD Operations Plan established a multi-pronged approach—at transit stations, bus checkpoints, and barricades on streets approaching the Inner Harbour, and by roving bicycle and foot patrols—in an effort to maximize liquor interdiction. At each stage individuals were to be checked, and their bags or backpacks examined visually, or manually, or both.

In order to assist the Commission with the legal issues surrounding the searches conducted, the services of a very experienced attorney were secured for the purpose of preparing a legal opinion focusing on the examination of bags carried by pedestrians and bus passengers, which is the



subject of the complaint by the BCCLA. The analysis found below will be based on this legal opinion. I would nevertheless invite the reader to refer to the full legal opinion.

Section 8 of the *Canadian Charter of Rights and Freedoms* (Charter) gives everyone “the right to be secure against unreasonable search or seizure.” Visual or manual examination of the contents of bags or backpacks constitutes a “search” under the Charter. Individuals have a reasonable expectation of privacy in the contents of bags they carry, which may contain any number of sensitive personal items.

The Supreme Court of Canada has made it clear that a search will be “reasonable” if and only if (a) it is authorized by law, (b) the law is reasonable, and (c) it is carried out in a reasonable manner.<sup>7</sup> To be “authorized by law” a search must be authorized by a specific statute or common law rule, be carried out in accordance with the law’s procedural and substantive requirements, and its scope must not exceed the authorized limits of the area or objects to be searched.<sup>8</sup>

Accordingly, the possible legal justifications for the Canada Day searches in Victoria are: (a) consent, (b) the *Liquor Control and Licensing Act*, (c) B.C. Transit (for the bus searches), and (d) general police powers.

#### **(i) Consent and the Canada Day searches**

The foundation for analysis of consent searches is the realization that the giving of consent to be searched is the waiver of one’s right under section 8 of the Charter to be secure against unreasonable search and seizure. One who is detained (or arrested) is entitled to be informed of his or her section 10 Charter right to retain and instruct counsel without delay. A detainee who has not been advised of the right to consult counsel cannot validly consent to be searched.<sup>9</sup>

The courts have consistently recognized that a police “request” carries at least an element of authority, and in some instances, conveys an element of compulsion. Acquiescence in, or compliance with, a police request to search, or failure to object to or resist it, does not amount to consent to be searched. Consent to search must be informed, based on awareness of the right to refuse it. Although the police officers are not specifically required to advise the person of the right to refuse consent, failure to do so risks a finding of lack of consent.

Anyone whose bag was searched, such as Ms. Sun, was stopped for the purpose of determining whether his or her bag contained liquor. To stop a person for the purpose of searching his or her bag is to “detain” that person. A “detainee” may only give a valid consent to be searched after the detainee has been advised of the right to counsel and, if the detainee wishes to do so, has exercised that right by speaking with counsel.<sup>10</sup> Ms. Sun was not advised of her right to counsel. On this ground alone the bag searches were not consent searches.

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<sup>7</sup> *R. v. Collins*, [1987] 1 S.C.R. 265 at 278.

<sup>8</sup> *R. v. Caslake*, [1998] 1 S.C.R. 51 at 60.

<sup>9</sup> *R. v. Debot*, [1989] 2 S.C.R. 1140 at pp. 1146 and 1147.

<sup>10</sup> *R. v. Borden*, [1994] 3 S.C.R. 145.

Moreover, the stated goal of the VPD Operations Plan and of the RCMP Operational Plan, i.e. early interdiction of liquor, is potentially irreconcilable with ensuring that the citizen is aware of the right not to be searched. The well-publicized need to control excessive liquor consumption and vandalism, and the use of search checkpoints, would cause the ordinary citizen to infer that the search was necessary—perhaps worthily necessary, but still necessary. The impression given is that everyone who is proceeding toward the venue is subject to a search, and that is what the VPD Operations Plan and the RCMP Operational Plan rely upon to achieve their stated goals. To dispel this sense, and afford the genuine option of not being searched, would require something along the lines of “those who volunteer to be searched will be searched; those who do not, will not; and all will be allowed to proceed.” This would completely undermine the efficacy of the checkpoints.

“Keeping normal people onside,” as described at page 10 of the VPD Operations Plan, involves persuading them to acquiesce to the searches, which appears to have been successfully achieved in the vast majority of cases. In order for the VPD Operations Plan to succeed, the officers had to persuade everyone to agree to be searched, and to search all except those who “strenuously objected,” as indicated at page 12 of the Operations Plan. This, however, is not a recipe for a consent search. It is doubtful if many of those whose bags were searched felt that they had a genuine alternative to agreeing to be searched. Certainly no consent to search was given by Ms. Sun who was searched at bus stops. Indeed, there appears to be a complete conflict between genuine consent searches and the full screening process such that consent could not be relied upon as the basis of these searches.

**FINDING: Ms. Sun did not consent to having her bag searched by RCMP members.**

**FINDING: There is a strong possibility that those whose bags were searched by RCMP members did not give genuine consent to having their bags searched.**

#### **(ii) The B.C. *Liquor Control and Licensing Act* and the Canada Day Searches**

The *Liquor Control and Licensing Act* (Act) prohibits, among other things: consumption of liquor in a public place (section 40); intoxication in a public place (section 41); operating a motor vehicle containing liquor unless it is in a container that is unopened and has an unbroken seal (section 44); and possession of liquor by a minor, or supplying it to a minor (section 34).

The Act does not prohibit possession of liquor that is in a sealed container in a public place; indeed, it does not prohibit possession of liquor that is in an unsealed container in a public place that is not a motor vehicle.

Staff Sergeant Legassicke indicated that the RCMP relied on the Act for their justification for checking for alcohol. The power to search without a warrant for unlawful liquor is contained in section 67 of the Act, which provides:

- (1) A peace officer who, on reasonable and probable grounds, believes that liquor is, anywhere or on anyone, unlawfully possessed or kept, or possessed or kept for unlawful purposes may, subject to subsection (2), enter or search, or both, for the liquor where the

peace officer suspects it to be, and may seize and remove liquor found and the packages in which it is kept.

Subsection (2) permits a peace officer to search any person, and to enter and search anywhere except a residence, for this purpose without a warrant.

As applied to the search of a person, this provision requires that the peace officer must believe, on reasonable and probable grounds, that liquor is being unlawfully possessed or kept, or possessed or kept for unlawful purposes, on the person. Accordingly, before searching, the officer must subjectively believe, and must objectively have reasonable and probable grounds to believe (a) that there is liquor on the person, and (b) that an adult's possession of it is for an unlawful purpose.

The grounds must be individualized to the subject of the search. It is not enough to believe that some, or many, or most, people in a particular group are in possession of liquor for an unlawful purpose.

Under section 67 the power to seize liquor, once found, is similarly limited to liquor that the peace officer believes on reasonable and probable grounds is unlawfully possessed, or possessed for unlawful purposes.

Whenever a peace officer seizes liquor, whether it is immediately destroyed or retained, section 72 of the Act requires an immediate report by the chief constable or officer in charge of the detachment to the general manager of the Liquor Control and Licensing Branch. Section 70 permits the owner of the liquor to claim it, and the general manager may order the liquor returned or order the seizing force to compensate the owner.

Justification of the Canada Day searches under section 67 of the Act would require scrutiny of each and every search by these standards.

The first question to ask is: What were the objective grounds to believe that the person was in possession of liquor. Merely because one is carrying a bag, backpack or purse capable of containing bottles or cans does not mean that he or she is likely doing so. Carrying a bag or backpack on a public bus or in the vicinity of an event at which alcohol is being consumed in copious quantities does not afford reasonable and probable grounds to believe that one is carrying alcohol in it. The addition of a third element, evident drinking already that evening, might be enough to satisfy a court that there were reasonable and probable grounds to believe the bag or backpack contained more liquor. It seems likely that there were no reasonable and probable grounds to believe the person was in possession of liquor in very many of the Victoria searches.

As it is an offence for a minor to be in possession of liquor, section 67 authorizes a search of a minor's bag or backpack if and only if there objectively are reasonable and probable grounds to believe he or she is in possession of liquor.

In those situations in which there were reasonable and probable grounds to believe an adult was in possession of liquor, were there also reasonable and probable grounds to believe the

possession was for an unlawful purpose? Simply possessing liquor in a public place is not an offence. The “unlawful purpose” must be the individual’s intention to consume the liquor in a public place and, in this case, the RCMP member must have sufficient grounds to believe this is being carried out. The context is that the event, which is notorious for excessive alcohol consumption by some participants, is occurring in a public place on a public holiday when the liquor stores are closed (although beer and wine shops, and public bars, are open).

Before the bag is opened, there is no reason to believe that any can or bottle inside it is open as opposed to sealed. At that stage, in assessing the grounds for believing the contents will be consumed in a public place, the officer must operate on the assumption that the can or bottle is sealed.

Once the adult’s bag has been searched, and liquor found inside it, the right to seize the liquor under section 67 of the Act similarly requires that the peace officer believe on reasonable and probable grounds that it is possessed for an unlawful purpose. Logically, if these grounds existed before the bag was opened, they will be equally strong once the liquor has been located, and, if anything, stronger if the liquor container is found to be open. However, if the grounds did not exist before the bag was opened, the search is not authorized under section 67 of the Act and the subsequent finding of the liquor does not alter that.

Nothing in the VPD Operations Plan or in the RCMP Operational Plan indicates that the officers were to make or did in fact make a record of the liquor seized, as called for by section 72 of the Act. When asked to produce their records or notes, the RCMP members, with the exception of three members, were unable to do so. Without such a record, the RCMP is not in a position to defend any compensation claims, including those that might be advanced if the seizures are subsequently determined to be unlawful. I have already commented on the lack of note taking by the RCMP members and will not be repeating my comments.

The probability that the purpose of carrying liquor in the Canada Day circumstances for an unlawful purpose would seem to increase as one nears the event venue, and also if it is evident that the person has already been drinking. Some of the Victoria searches were likely authorized under the Act, but section 67 provides no support for the screening searches that successful implementation of the VPD Operations Plan and the RCMP Operational Plan calls for.

In the case of Ms. Sun, it is important to note that when she was asked to open the bag she was carrying by members of the RCMP prior to boarding the bus, she had not been drinking, was alone and was acting in a normal fashion. As such, I find that the RCMP members did not have grounds, under the *Liquor Control and Licensing Act*, to search Ms. Sun’s bag.

**FINDING: The RCMP members did not have grounds, under the *Liquor Control and Licensing Act*, to search Ms. Sun’s bag.**

**(iii) The *British Columbia Transit Act* (and regulations) and the Canada Day searches**

The buses in Victoria, B.C. provide a public transportation service under the authority of the *British Columbia Transit Act*.<sup>11</sup>

The *Transit Conduct and Safety Regulation*, B.C. Reg. 377/85, provides:

6(1) Where British Columbia Transit makes rules, or posts signs on transit vehicles or other transit property, for the safety, good order or convenience of persons while they are on, entering or leaving a transit vehicle or other transit property, a transit employee may require, as a condition of allowing any person to enter or remain on the transit vehicle or transit property, that the person obey the signs or comply with the rules.

Failure to obey or comply may result in refusal of permission to enter, or an order to leave, the transit vehicle (section 6(2)), non-compliance with which is an offence under section 9.

This regulation permits a transit employee to deny the use of the vehicle to anyone who disobeys a posted sign or does not comply with rules that B.C. Transit has made.

The transit employee's power to deny the use of a transit vehicle is contingent upon the person's disobedience of a sign or failure to comply with rules. The disobedience or failure must be established before the employee may take such action.

The regulation does not authorize the transit employee to search the passenger or would-be passenger in order to determine whether the person is disobeying or not complying. It is not the source of a power to search passengers' bags.

Moreover, the signs that were posted pursuant to this regulation reminded customers that "consumption of liquor or open liquor on buses is not tolerated." It is noteworthy, therefore, that what is thereby prohibited is consuming liquor on board buses, or carrying open liquor on board buses, but not carrying closed or sealed liquor on board buses. Therefore, one carrying liquor that is not open, and not consuming it, is not disobeying this sign. Again, even if this regulation authorized a search, it would not authorize a search for all liquor, but only open liquor.

The VPD Operations Plan was not clear as to whether unopened liquor was to be seized at the bus stops or not. At page 14 of the VPD Operations Plan it is stated both that "3. Adults...that have unopened liquor in their possession [...] will be allowed to proceed without having their liquor seized" and also "5. In general, no persons will remain on the bus with liquor in possession, but discretion may be used in the case of the elderly etc."

The *British Columbia Transit Act* and *Transit Conduct and Safety Regulation* do not authorize the searches of passengers' bags conducted at the bus stops, either at the outset or at the established checkpoints where transit drivers stopped because they felt they needed assistance.

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<sup>11</sup> R.S.B.C.1996, c. 38.

**FINDING: The *British Columbia Transit Act* and *Transit Conduct and Safety Regulation* do not authorize the searches of passengers' bags conducted at the bus stops, such as the search of Ms. Sun, either at the outset or at the established checkpoints where transit drivers stopped because they felt they needed assistance.**

#### **(iv) General Police Powers and the Canada Day Searches**

The seminal statement of the duties and powers of the police at common law is set out in the English Court of Criminal Appeal judgment in *R. v. Waterfield*, [1964] Q.B. 164, namely, that if the police officer's conduct is prima facie an unlawful interference with a person's liberty or property,

“[...] it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognized at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.”

The *Waterfield* test, as it has come to be known, has been applied on numerous occasions by the Supreme Court of Canada and other Canadian courts.<sup>12</sup>

As police powers flow from the duties of the police, the analysis must begin with an examination of the duties of the police imposed by statute or otherwise recognized at common law. The more significant duties are extremely general. At common law, the principal duties of police officers are “the preservation of the peace, the prevention of crime, and the protection of life and property.”<sup>13</sup>

The common law duties to preserve the peace and prevent crime are preserved in federal legislation. Section 18(a) of the *RCMP Act* declares that the duties of RCMP members who are peace officers include the duty,

to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody.

The *Waterfield* test can support only lawful police conduct. The duty to preserve the peace and to protect life and property does not give the police all the powers they would wish to have in order to carry it out effectively. Specifically, the common law power to search individuals, their belongings and premises is circumscribed. The extent of common law search powers is limited by the minimal intrusion required by the “reasonably necessary” test. This involves assessing

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<sup>12</sup> e.g. *R. v. Clayton*, [2007] 2 S.C.R. 725.

<sup>13</sup> *Dedman v. The Queen*, [1985] 2 S.C.R. 2 at paragraphs 11 and 32; *R. v. Mann*, [2004] 3 S.C.R. 59 at paragraph 26; *R. v. Clayton*, [2007] 2 S.C.R. 725 at paragraph 69; *R. v. Kang-Brown*, [2008] 1 S.C.R. 456 at paragraph 151.

and balancing the importance of the reason for the intrusion and the need for it, with the nature and extent of the intrusion.

The majority of the common law powers to detain and search that have been held to be justified involve emergency situations, or apprehended violence, or both, and are restricted to a measured response to the threat. Justification for the random motor vehicle stops is the highway and street carnage caused by impaired drivers and unsafe vehicles.

One's bag or backpack is likely to contain personal items, including highly sensitive ones. Accordingly, examination that reveals the contents intrudes severely into the bearer's privacy. Although a lesser interference than a search of the person, a search of a bag is quite intrusive, and a search of a bag that reveals the personal contents is also highly intrusive.

Balancing the reasons for the searches with their scope, it would seem that the Victoria Canada Day searches are not justified under the common law police powers. As there is no statutory basis supporting these searches, they are not justified under the *Waterfield* test.

### **The Charter and the Canada Day searches**

As Mr. Justice Binnie pointed out in *R. v. Clayton*, the *Waterfield* "reasonably necessary" test is a lower standard than the Charter test. Therefore, some searches that are justified under *Waterfield* are not justified under the Charter. However, any search that is not justified under *Waterfield* cannot be justified under the Charter. Accordingly, based on the foregoing analysis, the Victoria Canada Day searches discussed herein would have been in violation of the Charter.

Assuming that a safe civic celebration, in this case of the country's founding, is a "pressing and substantial" concern in a free and democratic society, I must ask: What role do searches play in achieving that objective, and what impact do they have on constitutional rights?

The inspection of all bags at the bus stops and venue entrance was aimed at achieving the stated objective. However, particularly those searches performed at the bus stops would have captured people who are riding on the public transportation system but had nothing to do with the event, nor were acting unlawfully.

Based on the VPD Operations Plan and the RCMP Operational Plan, the Victoria Canada Day searches, while designed to achieve the objective of a safe civic celebration, appear to have been considerably broader in scope than Charter or common law considerations permit, and did not minimally impair the constitutional right to be secure against unreasonable search or seizure.

**FINDING: The RCMP Operational Plan and the VPD Operations Plan, while designed to achieve the objective of a safe civic celebration, appear to have been considerably broader in scope than Charter or common law considerations permit, and did not minimally impair the constitutional right to be secure against unreasonable search or seizure.**

## Conclusion

Civic events, such as those for Canada Day in Victoria, are significant community celebrations that should be encouraged. Regrettably, a minority of participants have made these events occasions for drunkenness, which has led to rowdiness, fights, and vandalism. As a result, in British Columbia in recent years a number of such events have been cancelled, and are no longer celebrated. The survival of others, including Canada Day in Victoria, is dependent upon the development of a proper means to minimize public drunkenness and its consequences in order to protect the safety and enjoyment of the majority.

The Canada Day fireworks in Victoria typically attract a crowd of some 45,000 people, including a number of families. That the great majority of them appreciate the event is reflected in the attendance numbers. The fact that they appreciate the steps being taken to make it safe and enjoyable is similarly shown by their acquiescence in the searches. Indeed, the complaint of Ms. Sun was not that her bag was searched, but that it was searched three times.

The police have power under the *Liquor Control and Licensing Act* to arrest those who are intoxicated in a public place (section 41(2)), and to search those who are consuming liquor in a public place (sections 67, 40(1)), and to search a minor who is reasonably believed to be in possession of liquor (sections 67, 34(3)). The strategy that has been developed in Victoria supplements these provisions—which, on their own, proved inadequate in earlier years—with searches of bags large enough to contain cans or bottles of liquor at public transit stations, bus checkpoints, and barricades near the Inner Harbour, as well as by roving bicycle and foot patrols.

In 2008, the early interdiction of liquor was successful operationally. These searches led to the interception of a very large quantity of liquor that would otherwise have been consumed during the fireworks festivities that day, thereby reducing the amount of drunkenness and attendant violent behaviour. Many of the searches were conducted as a random screening process, without specific grounds related to the individual. Ultimately, at present these bag searches are legally justified only if the searching officer has reasonable and probable grounds to believe an offence is being committed, and that the bag contains evidence of it.

A plausible option to consider in order to permit the RCMP to continue with this successful approach to the prevention of the disruption of a civic celebration caused by the excessive liquor consumption of a relative few, is the necessity for the provincial government, the City of Victoria, and B.C. Transit, or one or more of them, to provide a Charter-compliant legislated basis for the police action.

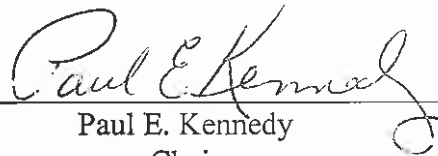
I recommend that until such time that the required legislative bases are put in place, the RCMP's participation in preventative and early interdiction liquor strategies be limited to police presence and that searches only be conducted when the RCMP members have grounds under the applicable legal authority. Furthermore, I reiterate my recommendation that RCMP members take notes and document their actions.



**RECOMMENDATION: I recommend that until such time that the required legislative bases are put in place, the RCMP's participation in preventative and early interdiction liquor strategies in B.C. be limited to police presence and that searches only be conducted when the RCMP members have the requisite grounds under the applicable legal authority. Furthermore, I reiterate my recommendation that RCMP members take thorough and contemporaneous notes to document their actions.**

Pursuant to subsection 45.43(3) of the *RCMP Act*, I respectfully submit my Public Interest Investigation Report.

JAN 23 2009



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Paul E. Kennedy  
Chair



July 8, 2008

Dirk Ryneveld, Police Complaint Commissioner  
Office of the Police Complaint Commissioner, British Columbia  
#320 - 1111 Melville Street  
Vancouver, BC  
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Paul Kennedy, Chair  
Commission for Public Complaints Against the RCMP  
PO Box 3423, Station 'D'  
Ottawa, Ontario  
K1P 6L4

Dear Messrs. Kennedy and Ryneveld,

**RE: Municipal police departments and RCMP seizure of alcohol on Canada Day in Victoria**

I am writing on behalf of the B.C. Civil Liberties Association (BCCLA) to initiate policy complaints under the *Police Act* and the *RCMP Act* regarding the random and mandatory search and subsequent seizure of closed bottles of alcohol by the municipal police forces of Victoria, Saanich, Central Saanich and Oak Bay as well as the RCMP detachment in West Shore. According to media reports, these police forces jointly initiated a program to limit the amount of alcohol brought to Canada Day celebrations in Victoria, BC. If any other police forces were involved in this program, they should be included in this complaint.

According to a witness report, municipal and RCMP initiated random and non-consensual searches of people to search for alcohol. These searches were carried out in numerous places throughout Victoria, but apparently public transit and transit exchanges were targeted. It appears that many or all of the buses travelling to downtown Victoria were stopped, and passengers were made to exit for mandatory searches. All alcohol, including closed bottles, was apparently seized. The witness can be contacted through the BCCLA, and has supplied a detailed account of the searches supported by photographic evidence.

While the BC Civil Liberties Association understands the need to limit public consumption of alcohol at large public gatherings, a blanket policy to seize alcohol

To: Office of the Police Complaint Commissioner, Commission for Public Complaints  
From: Rob Holmes  
Date: July 8, 2008  
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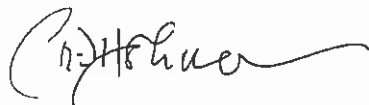
does not take into consideration that alcohol is a legal substance and that there is no way of knowing whether the alcohol would have been consumed in a public setting.

The BC Civil Liberties Association complains that

- police forces in Canada do not have the legal authority to initiate random or mandatory searches such as those that occurred in Victoria; and,
- police forces in Canada cannot seize property without legal authority. While alcohol cannot be consumed in a public place, there is no law prohibiting people from carrying closed containers of alcohol

Canada Day is a celebration of the independence and freedom of Canada and Canadians. It is absolutely repugnant to see such a celebration tarnished by a policy of illegal search and seizure. The relevant police departments ought to issue an immediate and unequivocal apology for their actions on Canada Day and ensure that such actions are never again repeated.

Yours sincerely,



Rob Holmes,  
President

FILE DOSSIER	5430-2008 → C.R.
TO A	C. Crotty
INDEX	118141
FILE CHARGES TO DOSSIER CONSIGNÉ A	

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## LEGAL OPINION – VICTORIA CANADA DAY LIQUOR SEARCHES

### I. OVERVIEW

Canada Day fireworks celebrations in Victoria have developed a history of excessive liquor consumption leading to assaults, injuries, vandalism and damage. To combat this, the police have developed a strategy of early liquor interdiction based on searches of bags and backpacks that might contain liquor. Unfortunately, in the main these searches were not genuine consent searches, and were not authorized under the *Liquor Control and Licensing Act*, *British Columbia Transit Act* and regulations, or general common law police powers. If such searches are to contribute to the security necessary for this civic celebration to continue in the future, they must be given some legislative authority which is justifiable under the *Canadian Charter of Rights and Freedoms*.

### II. SCOPE OF THIS OPINION

The focus of this opinion is on the examination of bags carried by pedestrians and bus passengers, which is the subject of the complaint by the B.C. Civil Liberties Association. It does not consider other activities on Canada Day, such as roadblocks, or searches of passenger vehicles or motor vessels.

Further, the event was a civic celebration at which the concern was excessive consumption of alcohol. Other special occasions, such as demonstrations, with the spectre of violence by either the demonstrators or their opponents, and parades with dignitaries who may need protection, raise different considerations that would involve a separate analysis.

### III. EXAMINATION OF THE BAGS IS A *CHARTER* SEARCH

The Operations Plan established four layers of scrutiny –at transit stations, bus check points, and barricades on streets approaching the Inner Harbour, and by roving bicycle and foot patrols - in an effort to maximize liquor interdiction. At each stage individuals were to be checked, and their bags or backpacks examined visually, or manually, or both.

Section 8 of the *Canadian Charter of Rights and Freedoms* gives everyone “the right to be secure against unreasonable search or seizure”. The law of search and seizure under the *Charter* has developed in cases where the “search revealed incriminating evidence. A “search” under s.8 is an intrusion by the police (or other state actor) into an

individual's "reasonable expectation of privacy": *Hunter v. Southam*, [1984] 2 S.C.R. 145 @ 159.

Visual or manual examination of the contents of bags or backpacks constitutes a "search" under the *Charter*. Individuals have a reasonable expectation of privacy in the contents of bags they carry, which may contain any number of sensitive personal items. It matters not that the officer intends only to seize any contraband found, and not to lay charges. The examination is the intrusion and the "search", and the items are seized, even though what the search reveals does not alter the officer's intent and no charges are laid.

The Supreme Court of Canada has made it clear that a search will be "reasonable" if and only if (a) it is authorized by law, (b) the law is reasonable, and (c) it is carried out in a reasonable manner: *R. v. Collins*, [1987] 1 S.C.R. 265 @ 278. To be "authorized by law" a search must be authorized by a specific statute or common law rule, be carried out in accordance with the law's procedural and substantive requirements, and its scope must not exceed the authorized limits of the area or objects to be searched: *R. v. Caslake*, [1998] 1 S.C.R. 51 @ 60.

As a result, the police must have legal justification for searching bags for contraband items, such as weapons, drugs, unlawful liquor, or child pornography.

The possible legal justifications for the Canada Day searches in Victoria are: (a) consent, (b) the *Liquor Control and Licensing Act*, (c) B.C. Transit (for the bus searches), and (d) general police powers.

#### IV. CONSENT

##### A. The law pertaining to consent searches

The foundation for analysis of consent searches is the realization that the giving of consent to be searched is the waiver of one's right under s. 8 of the *Charter* to be secure against unreasonable search and seizure. The courts apply a stringent test to the yielding of a constitutional right.

One who is detained (or arrested) is entitled to be informed of his or her section 10 *Charter* right to retain and instruct counsel without delay. A detainee who has not been advised of the right to consult counsel cannot validly consent to be searched: *R. v. Debot*, [1989] 2 S.C.R. 1140 @ 1146-7.

The courts have consistently recognized that a police "request" carries at least an element of authority, and in some instances, conveys an element of compulsion. Acquiescence in, or compliance with, a police request to search, or failure to object to or resist it, does not amount to consent to be searched.

The question is whether the person gave the consent voluntarily, and with an awareness of the consequences. The most detailed summary of the requirements of a consent search is that of Mr. Justice Doherty of the Ontario Court of Appeal in *R. v. Wills* (1992), 70 C.C.C. (3d) 529 @ 546, namely that the Crown must establish on a balance of probabilities that:

- (i) there was a consent, express or implied;
- (ii) the giver of the consent had the authority to give it;
- (iii) the consent was voluntary in the sense that the consentor was aware of what he was doing and aware of the significance of his act and the use which the police may be able to make of the consent, and the consent was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
- (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
- (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested, and
- (vi) the giver of the consent was aware of the potential consequences of giving the consent.

Consent to search must be informed, based on awareness of the right to refuse it. Although the police officer is not specifically required to advise the person of the right to refuse consent, failure to do so risks a finding of lack of consent. Mr. Justice Doherty said in *R. v. Lewis* (1998), 122 C.C.C. (3d) 481 (Ont.C.A.) at paragraph 12:

It is well established that a person cannot give an effective consent to a search unless the person is aware of their right to refuse to consent to that search... If the police do not tell a person of the right to refuse to give a consent to a search, the police run the very real risk that any apparent consent given will be found to be no consent at all for the purpose of s.8.

If the person whose consent is sought is intoxicated, or if his or her appreciation or judgment is impaired, then it is more, not less, difficult to establish the validity of an apparent consent: *R. v. Young* (1997), 116 C.C.C. (3d) 350 (Ont.C.A.).

## **B. Application to the Victoria searches**

Everyone whose bag was searched was stopped for the purpose of determining whether his or her bag contained liquor. To stop a person for the purpose of searching his or her bag is to “detain” that person. The Supreme Court of Canada has held in *R. v. Borden*, [1994] 3 S.C.R. 145 that a detainee may only give a valid consent to be searched after the detainee has been advised of the right to counsel and, if the detainee wishes to do so, has exercised that right by speaking with counsel. It seems clear that no one whose bag was

searched was advised of the right to counsel. On this ground alone the bag searches were not consent searches.

Moreover, the goal of the Operations Plan, early interdiction of liquor, seems irreconcilable with ensuring that the citizen is aware of the right not to be searched. The well-publicized need to control excessive liquor consumption and vandalism, and the use of search checkpoints, would cause the ordinary citizen to infer that the search was necessary – perhaps worthily necessary, but still necessary. The impression given is that everyone who is proceeding toward the venue is to be searched, and that is what the Operations Plan requires to achieve its goals. To dispel this sense, and afford the genuine option of not being searched, would require something along the lines of “Those who volunteer to be searched will be searched; those who do not, will not; and all will be allowed to proceed”. This would completely undermine the efficacy of the checkpoints.

“Keeping normal people onside” (Operations Plan, p.10) involves persuading them to acquiesce in the searches, which appears to have been successfully achieved in the vast majority of cases. In order for the Operations Plan to succeed, the officers had to persuade everyone to agree to be searched, and to search all except those who strenuously objected. (See Operations Plan, p.12). This, however, is not a recipe for a consent search. It is doubtful if many of those whose bags were searched felt that they had a genuine alternative to agreeing to be searched. Certainly no consent to search was given by either individual witness, both of whom were searched at bus stops and one of whom was also searched by roving officers.

Indeed, there appears to be a complete conflict between genuine consent searches and the full screening process such that consent could not be relied upon as the basis of these searches.

## ***V. LIQUOR CONTROL AND LICENSING ACT***

### **A. The relevant sections of the *Act* and their interpretation**

The *Liquor Control and Licensing Act* prohibits, among other things:

- consumption of liquor in a public place (s.40)
- intoxication in a public place (s.41)
- operating a motor vehicle containing liquor unless it is in a container that is unopened and has an unbroken seal (s.44)
- possession of liquor by a minor, or supplying it to a minor (s.34)

“Liquor” includes beer.

The *Act* does not prohibit possession of liquor which is in a sealed container in a public place; indeed, it does not prohibit possession of liquor which is in an unsealed container in a public place which is not a motor vehicle. The offence is consuming liquor in a public place.

Section 74(3) of the *Act* places the burden of proving the right to possess liquor on the person accused of improperly possessing it. Although this section has not been the subject of a constitutional challenge, based on decisions on other “reverse onus” provisions one would expect this to be restricted to requiring the person accused to raise a reasonable doubt that the possession was for an improper purpose: *R. v. Oakes*, [1986] 1 S.C.R.103; *R. v. Laba*, [1994] 3 S.C.R.965.

The power to search without a warrant for unlawful liquor is contained in s. 67 of the *Liquor Control and Licensing Act*, which provides:

(1) A peace officer who, on reasonable and probable grounds believes that liquor is, anywhere or on anyone, unlawfully possessed or kept, or possessed or kept for unlawful purposes may, subject to subsection (2), enter or search, or both, for the liquor where the peace officer suspects it to be, and may seize and remove liquor found and the packages in which it is kept.

Subsection (2) permits a peace officer to search any person, and to enter and search anywhere except a residence, for this purpose without a warrant.

As applied to a search of the person, this section requires that the peace officer must believe, on reasonable and probable grounds, that liquor is being unlawfully possessed or kept, or possessed or kept for unlawful purposes, on the person. Accordingly, before searching, the officer must subjectively believe, and must have objectively reasonable and probable grounds to believe (a) that there is liquor on the person, and (b) that an adult’s possession of it is for an unlawful purpose.

The grounds must be individualized to the subject of the search. It is not enough to believe that some, or many, or most, people in a particular group are in possession of liquor for an unlawful purpose; the question is the sufficiency of the grounds to believe that the individual to be searched is. The decision of Madam Justice Daphne Smith of the B.C. Supreme Court in *R. v. Campbell* 2002 BCSC 553 is instructive. At Crescent Beach, a well known area for young people to hang out and consume alcohol and drugs, or both, a group of young persons were standing around a parked vehicle late one summer evening. Patrol officers determined that one of them was underage and had been drinking from a mickey of vodka. A young adult who was standing 15-20 feet away refused to allow a search of his backpack. Madam Justice Smith held that the search of his backpack under s.67 was invalid because there was no objective basis for the belief that he was committing an offence under the *L.C.L.A.*, either by possessing liquor (he being of age) or supplying it to a minor.

The British Columbia Court of Appeal considered s. 67 in *R. v. Ellrodt* (1998), 130 C.C.C. (3d) 97. That case involved the search of a truck which had been stopped for speeding. On the floor in the rear was a six-pack carton of beer in which one bottle was uncapped. In holding that this did not establish reasonable and probable grounds to



believe there was open alcohol in the vehicle, and did not support a search of the vehicle for other open bottles, Madam Justice Ryan said:

[24]...The vehicle was stopped on the highway in the afternoon; there was no sign of bad driving or other symptoms of impaired behaviour; the one open bottle was, for all intents and purposes, empty; there was no smell of alcohol in the vehicle. In the circumstances in the case at bar the existence of one beer bottle with a quarter of an inch of beer in it sitting in the rear of a vehicle being driven by two young men was not a sufficient factual basis from which to draw the inference that there was open alcohol in the vehicle.

Under s. 67 the power to seize liquor, once found, is similarly limited to liquor which the peace officer believes on reasonable and probable grounds is unlawfully possessed, or possessed for unlawful purposes.

Whenever a peace officer seizes liquor, whether it is immediately destroyed or retained, s. 72 of the *Liquor Control and Licensing Act* requires an immediate report by the chief constable or officer in charge of the detachment to the general manager of the Liquor Control and Licensing Branch. Section 70 permits the owner of the liquor to claim it, and the general manager may order the liquor returned or order the seizing force to compensate the owner.

#### **B. Application to the Victoria searches**

Justification of the Canada Day searches under s. 67 of the *Liquor Control and Licensing Act* would require scrutiny of each and every search by these standards.

The first issue is what were the objective grounds to believe that the person was in possession of liquor. Merely because one is carrying a bag, or backpack, or purse capable of containing bottles or cans does not mean that he or she is likely doing so. Carrying a bag or backpack on a public bus or in the vicinity of an event at which alcohol is being consumed in copious quantities does not afford reasonable and probable grounds to believe that one is carrying alcohol in it. The addition of a third element, evident drinking already that evening, might be enough to satisfy a court that there were reasonable and probable grounds to believe the bag or backpack contained more liquor. It seems likely that there were not reasonable and probable grounds to believe the person was in possession of liquor in very many of the Victoria searches.

As it is an offence for a minor to be in possession of liquor, s. 67 authorizes a search of a minor's bag or backpack if and only if there are objectively reasonable and probable grounds to believe he or she is in possession of liquor.

In those situations in which there were reasonable and probable grounds to believe an adult was in possession of liquor, were there also reasonable and probable grounds to

believe the possession was for an unlawful purpose? Simple possession of liquor in a public place is not an offence. The “unlawful purpose” must be the individual’s intention to consume in a public place the liquor which there are sufficient grounds to believe is being carried. The context is that the event, which is notorious for excessive alcohol consumption by some participants, is occurring in a public place on a public holiday when the liquor stores are closed, although beer and wine shops, and public bars, are open.

Before the bag is opened, there is no reason to believe that any can or bottle inside it is open as opposed to sealed. At that stage, in assessing the grounds for believing the contents will be consumed in a public place, the officer must operate on the assumption that the can or bottle is sealed.

Once the adult’s bag has been searched, and liquor found inside it, the right to seize the liquor under s.67 similarly requires that the peace officer believe on reasonable and probable grounds that it is possessed for the unlawful purpose of consumption in a public place. Logically, if these grounds existed before the bag was opened, they will be equally strong once the liquor has been located, and if anything stronger if the liquor container is found to be open. However, if the grounds did not exist before the bag was opened, the search is not authorized under s.67 and the finding of the liquor does not alter that.

Nothing in the Operations Plan or investigation report indicates that the officers were to make or made a record of the liquor seized, as called for by s. 72 of the *Liquor Control and Licensing Act*. Without such a record, the force is in no position to defend any compensation claims, including those which might be advanced if the seizures are subsequently determined to be unlawful.

The probability that the purpose of carrying liquor in the Canada Day circumstances would seem to increase as one nears the event venue, and also if it is evident that the person has already been drinking. A distinct minority of the Victoria searches were likely authorized under the *Liquor Control and Licensing Act*, but s. 67 provides no support for the screening searches that successful implementation of the Operations Plan requires.

## **VI. B.C. TRANSIT**

### **A. The *British Columbia Transit Act* and regulations**

The buses in Victoria provide a public transportation service under the authority of the *British Columbia Transit Act*, R.S.B.C.1996, c.38.

The *Transit Conduct and Safety Regulation*, B.C. Reg. 377/85, provides:

6(1) Where British Columbia Transit makes rules, or posts signs on transit vehicles or other transit property, for the safety, good order or convenience of persons while they are on, entering or leaving a transit vehicle or other transit property, a transit employee may require, as a condition of allowing any person to enter or remain on the transit vehicle or transit property, that the person obey the signs or comply with the rules.

Failure to obey or comply may result in refusal of permission to enter, or an order to leave, the transit vehicle (s. 6(2)), non-compliance with which is an offence under s.9.

This regulation permits a transit employee to deny the use of the vehicle to anyone who disobeys a posted sign or does not comply with rules that British Columbia Transit has made.

### **B. Application to the Victoria searches**

The transit employee's power to deny the use of a transit vehicle is contingent upon the person's disobedience to a sign or failure to comply with rules. The disobedience or failure must be established before the employee may take such action.

The regulation does not authorize the transit employee to search the passenger or would-be passenger in order to determine whether the person is disobeying or not complying. It is not the source of a power to search passengers' bags.

Moreover, the signs which were posted pursuant to this regulation reminded customers that "consumption of liquor or open liquor on buses is not tolerated". It is noteworthy that what is thereby prohibited is consuming liquor on board buses, or carrying open liquor on board buses, but not carrying closed or sealed liquor on board buses. Therefore, one carrying liquor which is not open, and not consuming it, is not disobeying this sign. Even if this regulation authorized a search, it would not authorize a search for all liquor, but only open liquor.

The Operations Plan is ambiguously unclear as to whether unopened liquor is to be seized at the bus stops or not. At page 14 the Plan says both that "3. Adults...that have unopened liquor in their possession...will be allowed to proceed without having their liquor seized" and also "5. In general, no persons will remain on the bus with liquor in possession, but discretion may be used in the case of the elderly, etc."

The *British Columbia Transit Act* and *Transit Conduct and Safety Regulation* do not authorize the searches of passengers' bags conducted at the bus stops, either at the outset or at the established check points where transit drivers stopped because they felt they needed assistance.

## VII. GENERAL POLICE POWERS

### A. The *Waterfield* test

The seminal statement of the duties and powers of the police at common law is set out in the English Court of Criminal Appeal judgment in *R. v. Waterfield*, [1964] Q.B. 164, namely, that if the police officer's conduct is *prima facie* an unlawful interference with a person's liberty or property

...it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognized at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

The *Waterfield* test, as it has come to be known, has been applied on numerous occasions by the Supreme Court of Canada and other Canadian courts. Madam Justice Abella in *R. v. Clayton*, [2007] 2 S.C.R. 725 at para. 22 approved the following succinct statement of the inquiry to be made when common law police power is relied upon to justify police conduct that interferes with individual liberties:

First, the prosecution must demonstrate that the police were acting in the exercise of a lawful duty when they engaged in the conduct in issue. Second, and in addition to showing that the police were acting in the course of their duty, the prosecution must demonstrate that the impugned conduct amounted to a justifiable use of police powers associated with that duty.

### B. Statutory and common law police duties

The basis of police powers is police duties. The analysis must begin with examination of the duties of the police imposed by statute or recognized at common law. The major duties are extremely general.

At common law the principal duties of police officers are "the preservation of the peace, the prevention of crime, and the protection of life and property": *Dedman v. The Queen*, [1985] 2 S.C.R. 2 @ 11 and 32; *R. v. Mann*, [2004] 3 S.C.R. 59 @ para. 26; *Clayton* @ para. 69; *R. v. Kang-Brown*, [2008] 1 S.C.R. 456 @ para. 151.

These duties have been accepted as the basis of police powers at common law to:

-prohibit public access to an area near a hotel where a visiting dignitary from another country (who had recently been assaulted in another Canadian city) was making an appearance (*Knowlton v. R.*, [1974] S.C.R. 443);

-preserve evidence (*Waterfield*);

-set up a roadblock to screen all vehicles leaving a parking lot at which an emergency 911 call reported that people were openly displaying handguns (*Clayton*);

-stop motor vehicles at random (*Dedman*);

-forcibly enter a dwelling in response to an emergency 911 call (*R. v. Godoy*, [1999] 1 S.C.R. 311);

-search an individual who is arrested (*Cloutier v. Langlois*, [1990] 1 S.C.R. 158);

-search an individual detained for investigative purposes (*Mann; Clayton*); and

-search an individual against whom there is individualized reasonable suspicion by means, such as drug-detecting sniffer dogs, which are minimally intrusive and reveal only the presence or absence of contraband (*Kang-Brown*).

The common law duties to preserve the peace and prevent crime are preserved in both provincial and federal legislation. The *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, s.18(a) declares that the duties of R.C.M.P. members who are peace officers include the duty

to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody.

Similarly, in British Columbia the *Police Act*, R.S.B.C. 1996, c.367, by s. 7(2) requires that

The provincial police force, under the commissioner's direction, must perform the duties and functions respecting the preservation of peace, the prevention of crime and offences against the law and the administration of justice assigned to it or generally to peace officers by the commissioner, under the regulations or under any Act.

Section 34(2) imposes the same obligation on each municipal police department under the direction of the chief constable.

Section 10(1) provides:

Subject to the restrictions specified in the appointment and the regulations, a provincial constable, an auxiliary constable, a designated constable or a special provincial constable has, while carrying out the duties of his or her appointment, jurisdiction throughout British Columbia to exercise and carry out the powers, duties, privileges and responsibilities that a police

constable or peace officer is entitled or required to exercise or carry out at law or under an enactment.

As noted, the police duty to enforce statutes provides a further basis for their action. Thus, legislation specifically authorizing roadblocks and random stopping of motor vehicles to check safety and sobriety compliance with the law creates a duty to enforce it: *R. v. Ladouceur*, [1990] 1 S.C.R. 1257; *R. v. Orbanski*, [2005] 2 S.C.R. 3.

The *Waterfield* principle can support only lawful police conduct. Mr. Justice Dickson, as he then was, explained the lawfulness requirement in his dissent in *Re Wiretap Reference*, [1984] 2 S.C.R. 697 @ 718:

Furthermore, the *Waterfield* test provides no assistance when the police have trespassed to install a listening device. I cannot accept that conduct of itself unlawful and initiated with full knowledge of its potential illegality could ever fall within the general scope of a policeman's duty. As Lord Edmund-Davies recognised in *Morris v. Beardmore, supra*, [[1980]2 All E.R. 753] at p. 759:

My Lords, I have respectfully to say that I regard it as unthinkable that a policeman may properly be regarded as acting in the execution of his duty when he is acting unlawfully, and this regardless of whether his contravention is of the criminal law or simply of the civil law.

(See also *Dedman* @ 15 per Dickson C.J., dissenting in the result; and *Clayton* @ para. 22.)

### **C. Evaluation of whether the use of the powers is justified**

#### **(i) The second branch of the *Waterfield* test**

Assuming that the police conduct falls within the general scope of a duty, the next question is whether it involves an unjustifiable use of powers associated with that duty. The duties which society imposes upon police officers exceed the powers which it gives them to perform those duties; the police have wide duties but limited powers: *Clayton* @ para. 68; *Dedman* @ 12. One must examine both whether the police have the power to do what they did, and also whether their conduct exceeded the proper limits of that power.

The standard for the second branch of the *Waterfield* test is the “reasonably necessary” test set out by Mr. Justice Le Dain in *Dedman* at p.35:

The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.

The considerations informing the evaluation include, as Mr. Justice Iacobucci said in *Mann* at para. 39:

... the duty being performed, the extent to which some interference with individual liberty is necessary in the performance of that duty, the importance of the performance of the duty to the public good, the nature of the liberty being interfered with, and the nature and extent of the interference.

The relevant considerations were described somewhat differently by Madam Justice Abella for the majority in *Clayton* at para. 31, discussing the power to detain and search without arrest:

The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to the circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.

All of these expressions of the *Waterfield* test, balancing the reasons for interfering with liberty and the extent of the interference, emphasize the need to minimize that interference.

## **(ii) The importance of legislation**

Some members of the Supreme Court are uncomfortable with the adequacy of the *Waterfield* “reasonably necessary” test as a restraint on police powers in the *Charter* era. In *Orbanski* Justices LeBel and Fish expressed their concern thus at para. 81:

The adoption of a rule limiting *Charter* rights on the basis of what amounts to a utilitarian argument in favour of meeting the needs of police investigations through the development of common law police powers would tend to give a potentially uncontrollable scope to the doctrine developed in the *Waterfield-Dedman* line of cases....

The courts' discomfort with developing common law police powers in the *Charter* era was emphasized in *Kang-Brown*, which involved the police use of drug-detecting sniffer dogs. Four members of the Supreme Court of Canada, Justices LeBel, Fish, Abella and Charron, held in that context that any extension of common law police powers should be effected by Parliament and constitutionally justified before the courts. Mr. Justice Rice of the New Brunswick Court of Appeal expressed the prevailing view in *R. v. Boudreau* (2001), 151 C.C.C. (3d) 530 at para 23:

Interference with lawful activities of citizens in our democracy is to be achieved through the enactment of proper legislation authorizing police authorities as in *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, 25 C.C.C. (3d) 22. Only in exceptional circumstances, upon clear and persuasive facts, are common law powers to be invoked.

### (iii) *Charter* scrutiny

In *Clayton* Mr. Justice Binnie joined Justices LeBel and Fish and, writing for the three, said (at paras. 58 and 78) that the “reasonably necessary” test is not the same as the *Charter* test, but sets a lower standard that is not an adequate substitute for *Charter* scrutiny. Phrased this way, *Charter* review of common law powers cannot be gainsaid. The Supreme Court has made it clear that the common law, as well as statutes, must conform to the *Charter*, and has refined the common law in such areas as strip searches incidental to arrest (*R. v. Golden*, [2001] 3 S.C.R. 679) and searches of law offices (*Lavallee, Rackel & Heintz et al v. Canada (A.G.)*, [2002] 3 S.C.R. 209) to make it comply with the *Charter*.

Mr. Justice Binnie proposed (in *Clayton* at paras. 59-60) that the *Charter* analysis of police common law powers comprise four questions:

...firstly, does the alleged police power exist at common law;  
secondly, if so, does the claimed police power authorize interference with *Charter* rights including an individual’s reasonable expectation of privacy (s.8) or result in arbitrary detention (s.9);and  
thirdly, if so, is the law authorizing the infringement (in this case a common law) justified as a reasonable limit under s.1 of the *Charter*?

...  
If the existence of the police power is found to be constitutional, a fourth question may arise in a particular case: was the power thus established exercised reasonably in “the totality of the circumstances”?

With respect to the third question, *Charter* scrutiny requires that any interference with a *Charter* right must, in the words of s. 1, be within “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. The test for justification of a law which authorizes interference with a *Charter* right is set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 @ 138-140, as modified by *Dagenais v. C.B.C.*, [1994] 3



S.C.R. 835 @ 887-889 and *Thomson Newspapers v. Canada (A.G.)*, [1998] 1 S.C.R. 877 @ 967-970. It may be summarized as:

- (1) Is the objective of the law sufficiently important to warrant overriding a constitutionally protected right or freedom? Are the concerns pressing and substantial in a free and democratic society?
- (2) Are the means rationally connected to the objective? Are they carefully designed to achieve the objective? Are they arbitrary, unfair or based on irrational considerations?
- (3) Do the means impair the right or freedom as little as possible, while fulfilling their purpose?
- (4) Do the salutary effects of the limitation of the right or freedom exceed the deleterious effects?

A law which infringes a *Charter* right can be justified only if its objective is of pressing and substantial concern, its means are rationally connected to that objective, its impairment of the *Charter* right is minimal, and its overall benefits are greater than its negative effects. In considering search and seizure this analysis is normally made, not under s. 1, but in determining whether the search or seizure is “unreasonable”.

#### **D. Application of the *Waterfield* test to date**

It is useful to compare those situations in which Canadian courts, and particularly the Supreme Court of Canada, have held the use of police powers justified under the *Waterfield* principle, with those in which they have held them not justified.

##### **(i) Use of powers justified**

The first requirement of justification is lawfulness. The common law requires that the police act lawfully in executing their duties: *Re Wiretap Reference* @ 718; *Dedman* @ 15; *Clayton* @ para. 22.

Forcible entry into a dwelling in response to an emergency 911 call in order to ascertain the health and safety of the subject of the distress call is justified at common law: *Godoy* @ paras. 15-22.

A carefully tailored roadblock or blockade to check all vehicles leaving a parking lot immediately following receipt of an emergency 911 call that handguns were being openly displayed there is justified at common law: *Clayton*. The court emphasized that the police reasonably believed there were prohibited weapons in a public place, creating a genuine risk of serious bodily harm to the public, and the roadblock was temporally, geographically and logistically responsive.

An arrested person and his or her immediate surroundings may be searched for weapons or for evidence of the offence for which the arrest is being made: *Cloutier*.

A police officer who is detaining an individual for investigative purposes and who has reasonable grounds to believe that his or her safety or the safety of others is at risk may conduct a protective 'frisk' or pat-down search of the detainee for weapons at common law: *Mann @* paras. 37-45.

Restricting public access to some public streets in the immediate vicinity of a hotel where a visiting dignitary (who has recently been assaulted in another Canadian city) is about to appear, is justified to prevent further indignities: *Knowlton*.

Random stopping of motor vehicles to inquire into the drivers' sobriety was held justifiable at common law before the *Charter: Dedman*, and statutorily authorized routine traffic checks have been upheld under the *Charter: Ladouceur*. In each case the Supreme Court divided almost evenly, and the majority emphasized the importance of deterring and detecting impaired driving, the necessity of random stops to effective detection, the regulations and controls on driving in the interests of safety, the publicity surrounding the roadblock programs, and the brief and minor intrusion experienced by innocent motorists.

In *Kang-Brown* the Supreme Court examined the police use of drug-detecting sniffer dogs as an aspect of the power to investigate and prevent crime. Five judges held that the common law permits dog sniffs where the police have individualized reasonable suspicion, because of the minimal intrusion, contraband-specific nature and pinpoint accuracy of a sniff by a trained and well handled dog. The other four members of the Court felt that there is no such power at common law, and only Parliament might authorize it; moreover, the minimum threshold for any common law search powers is reasonable grounds.

## (ii) Use of powers not justified

Unlawful acts are no proper part of the execution of police duties, and are not justified at common law: *Re Wiretap Reference @* 718; *Dedman @* 15 ; *Clayton @ para. 22*.

The use of powers is justifiable only if the conduct is within the proper limits of the power. Thus, the power to enter premises in response to an emergency 911 call is limited to the protection of life and safety, and does not permit further search of the premises (*Godoy @ para. 22*); the search incidental to arrest must be for security and evidentiary purposes related to the arrest, and not for any other purpose (*R. v. Caslake*, [1998] 1 S.C.R. 51) or of any broader scope (*R. v. Belnavis* (1996), 107 C.C.C. (3d) 195 (Ont. C.A.) @ 212-214); and the protective pat-down search of a detainee must be based on reasonable grounds to believe there is a risk to safety, and must be confined in scope to an intrusion reasonably designed to locate weapons (*Mann @* paras. 40-41).

The four minority judges in *Kang-Brown* considered that the minimum threshold for any police search power is reasonable grounds.

The dissenting judges in *Dedman* and *Ladouceur* considered that there was no power at common law to stop and detain a motorist.

In *R. v. Lindsay* (1999), 141 C.C.C. (3d) 526 security searches for weapons or dangerous objects were conducted of everyone (except court personnel, sheriffs, police officers, counsel, and others with prior security clearance) entering a courthouse, using a metal-detecting scanner, visual inspection of pocket contents, and manual or fluoroscopic examination of briefcases and other personal belongings. If the scanner was activated and there was need to verify the cause visually, a secondary search in private by a person of the same gender would be performed with the permission of the person, who could instead choose to leave unless it had already been detected that he or she was carrying a weapon. Notwithstanding the “notorious fact that security in the buildings that house the courts is a matter of real, and sometimes pressing, concern”, the Manitoba Court of Appeal held (at para. 39) that without a legislated foundation this perimeter security program

...cannot be saved as conduct falling within the general scope of any duty of a sheriff or peace officer recognized at common law. The implementation by Sheriff Services, Manitoba Justice, of a program subjecting every member of the public required to enter the Law Courts (as, for example, a party or witness in a civil or criminal proceeding, or a person having other business with the courts), or desiring to do so (for whatever reason), to an arbitrary and intrusive search goes far beyond the common law powers of a peace officer to preserve the peace, prevent crime, and protect life and property. It fails the first branch of the *Waterfield* test.

## **E. Application to the Victoria searches**

### **(i) The *Waterfield* test**

The duty to preserve the peace and to protect life and property does not give the police all the powers they would wish to have in order to carry it out effectively. Specifically, the common law power to search individuals, their belongings and premises is circumscribed. The extent of common law search powers is limited by the minimal intrusion required by the “reasonably necessary” test. This involves assessing and balancing the importance of the reason for the intrusion and the need for it, with the nature and extent of the intrusion.

Most of the common law powers to detain and search which have been held to be justified involve emergency situations, or apprehended violence, or both, and are restricted to a measured response to the threat. Justification for the random motor

vehicle stops is the highway and street carnage caused by impaired drivers and unsafe vehicles.

Without minimizing the violence which has occurred at previous Canada Day celebrations in Victoria, the drunken fighting, injuries, vandalism and damage do not compare to the dangers posed by guns and other weapons in *Clayton* and *Mann*. Even those dangers at a court house where security concerns were notorious did not support a common law power to conduct airport-type screening searches in *Lindsay*. The problems which have been experienced at Victoria's Canada Day celebrations rank comparatively low on the scale of importance of reasons supporting a common law power to detain and search randomly or without specific individualized grounds.

One's bag or backpack is likely to contain personal items, including highly sensitive ones. Accordingly, examination which reveals the contents intrudes severely into the bearer's privacy. Although a lesser interference than a search of the person, a search of bags is quite intrusive, and a search of bags which reveals the personal contents is highly intrusive.

The scope of the Canada Day screening searches in Victoria exceeded what would have been permitted if the subject had been detained for investigation (*Mann*). Indeed, the roadblock in *Clayton* did not involve any search of the vehicle or its occupants unless and until specific grounds to do so emerged. The bag and backpack searches constitute a relatively serious intrusion into the privacy of the bearers.

Balancing the reasons for the searches with their scope, the Victoria Canada Day searches are not justified under the common law police powers. They involve less reason and more intrusion than the court house searches in *Lindsay* or the protective pat-down search of a detainee (*Mann*).

As there is no statutory basis supporting these searches, they are not justified under the *Waterfield* principle.

### (ii) *The Charter*

As Mr. Justice Binnie pointed out in *Clayton*, the *Waterfield* "reasonably necessary" test is a lower standard than the *Charter* test. Therefore, some searches which are justified under *Waterfield* are not justified under the *Charter*. However, any search which is not justified under *Waterfield* cannot be justified under the *Charter*. Accordingly, based on the foregoing analysis, the Victoria Canada Day searches violate the *Charter*.

Assuming that a safe civic celebration, in this case of the country's founding, is a "pressing and substantial" concern in a free and democratic society, what role do searches play in achieving that objective, and what impact do they have on constitutional rights?

None of the searches was based on reasonable grounds or individualized suspicion, unless they happened also to be present. The inspection of all bags at the bus stops and

venue entrance is designed to achieve the objective, but particularly at the bus stops captures others who are riding on the public transportation system but have nothing to do with the event. The searches by the roving officers were arbitrary, in the sense that those to be searched appear to have been chosen at random.

The searches all consisted of visual or manual inspection, or both, of the contents of the bags and backpacks, without (in most cases) any consideration of the likelihood of contraband being found.

Based on the Operations Plan, the Victoria Canada Day searches, while designed to achieve the objective of a safe civic celebration, seem considerably broader than *Charter* considerations permit, and did not minimally impair the constitutional right to be secure against unreasonable search or seizure.

Further, it appears that a considerable quantity of unopened liquor was seized. Unopened liquor is contraband if and only if the person intends to consume it in a public place. However, the Operations Plan is ambiguously unclear about the seizure of unopened liquor at the bus stops, and calls for the seizure of any liquor found in the exclusionary zone except from a sober adult who is transiting the area. This means that many of the seizures were not authorized, and violated the *Charter*.

Many of the Canada Day searches and seizures in Victoria contravened the *Charter*.

## VIII. A LEGISLATED SOLUTION?

### A. The need for a legislative basis

The comments of the Supreme Court of Canada in *Orbanski* and *Kang-Brown* make clear that the courts' recognition of common law police powers is limited. Mr. Justice Rice in *Boudreau* captured their position, stating that the common law powers are to be invoked "only in exceptional circumstances, upon clear and persuasive facts".

*Waterfield* was decided in England in the 1960s, long before the Canadian *Charter*. It accepted that the police duty might either be "imposed by statute" or "recognized at common law". The disinclination of the Supreme Court to develop common law police powers in the *Charter* era means that police common law powers will likely be recognized only in established or emergency situations, and the primary source of police powers will be specific legislation. Thus, the courthouse security problem in *Lindsay* appears to have been subsequently resolved by a court order.

In the case of the Victoria liquor searches there are three possible sources of legislative authority to prohibit possession of alcohol and permit searches for it in specific limited situations. First, the provincial legislature might add a "special events" section to the *Liquor Control and Licensing Act*. Second, the City of Victoria might pass a by-law.

Third, B.C. Transit might amend its regulations and notices. Such legislation would make it an offence to possess liquor in specified limited situations, and define the power to search in such situations.

The offence of simple possession at the event would eliminate the issue of whether unopened cans and bottles are intended to be consumed in a public place; in the context of the fireworks event they may well be, but this is not necessarily the case. An offence of possession with an exception for possession with a defined lawful excuse should be easier to enforce than possession with the intention of consuming in a public place.

Legislation authorizing a search on less than individualized reasonable grounds must be justified in order to be found reasonable. It must be rationally connected to a pressing and substantial objective; it must minimally impair the right to be secure against unreasonable search and seizure; and its overall benefits must outweigh its negative effects.

The need for a search power based on less than reasonable grounds arises from the desirability of preventing assaults, fights, vandalism, damage and drunkenness from occurring, rather than attempting to identify and arrest participants afterwards. Almost never will there be reasonable and probable grounds to believe that a particular bag or backpack contains liquor; accordingly, preventing attendees from bringing liquor to the event which they will then drink to excess requires an ability to search the bag or backpack at the event on lesser grounds.

The full justification analysis would involve a comparison of the feasibility, efficacy and intrusiveness of groundless screening searches of bags and backpacks with other possible alternatives. That is beyond the scope of this opinion, which is limited to consideration of the bag and backpack searches.

## **B. Examples from other jurisdictions**

My search for legislation in other jurisdictions addressing the issues raised by events such as the Canada Day celebrations, and in particular, containing specific search powers, has produced only two such statutory schemes. Anyone considering drafting such legislation would be well advised to research this topic further.

The two statutory schemes are the British *Criminal Law (Consolidation) (Scotland) Act 1995* (c.39) and the Queensland *Police Powers and Responsibilities Act 2000* (extracts attached). Both authorize a public declaration of the special event, create the offence of possessing a prohibited item at or attempting to enter the event site, and authorize searches of those in or entering the event site about whose conduct there are reasonable grounds for concern.

Under the *Criminal Law (Consolidation) (Scotland) Act 1995* the Secretary of State may designate a sports ground or sporting event, or class of either (s. 18). It is an offence to

possess alcohol in or attempting to enter a designated ground on the occasion of a designated sporting event (s. 20(2)) or on a public vehicle which is being principally operated to convey passengers to or from a designated sporting event (s. 19(1)(a)). It is also an offence to possess a “controlled container” (as defined) in or attempting to enter a designated ground on the occasion of a designated sporting event (s. 20(1)), or to possess a “controlled article or substance” (as defined) there without lawful authority (s. 20(3),(4),(6)). A constable has the power without warrant to search a person who he has reasonable grounds to suspect is committing or has committed an offence (s. 21(b)) and to stop and search a vehicle on reasonable grounds to suspect that an offence under s. 19 has been or is being committed (s. 21(c)).

This Act creates the offence of possessing alcohol at the designated event or in a public vehicle dedicated to transporting passengers to and from it. The power to search a person requires individualized reasonable grounds to suspect that that person is committing an offence.

The Queensland *Police Powers and Responsibilities Act 2000* allows the Minister to declare an event to be a special event upon being satisfied, based on specified criteria, that the declaration is “necessary for preserving public order and the safety of individuals involved in the event and other individuals” (s. 559). The purpose of the legislation is to state special provisions necessary to do this (s. 557). The declaration regulation must state, among other things, prohibited items, access restrictions, and entry conditions (s. 558). These restrictions are to be publicized (s. 560, 562). It is an offence to take a prohibited item onto, or to possess a prohibited item on, a special event site, without a reasonable excuse (s. 574). Section 561 sets out the statutory conditions of entry to a special event site; the entrant

- (a) must, if asked, permit a search to be made of his or her personal property; and
- (b) must, if asked, permit a frisk search to be made of his or her person; and
- (c) must not take into or possess on the site a prohibited item.

A police officer may ask an entrant to the site to be examined, or to have his or her belongings examined, by an electronic screening device (s. 567) and to permit a frisk search of the entrant’s person (s. 569). A police officer may request the entrant to allow inspection of belongings or articles from the entrant’s clothing, to remove outer garments, and to open an article and allow inspection of it, if the officer “considers it necessary” and tells the entrant the reason (s. 568).

This Act creates the offence of possession of a prohibited item on, or taking a prohibited item into, a special event site, without reasonable excuse. Searches more intrusive than electronic screening devices and frisk searches, including inspection of articles in the possession of the entrant, may only be done if the officer reasonably considers it necessary and tells the entrant the reason. This also requires an individualized concern that that person is committing an offence.

### C. The United States

Professor Wayne R. LeFave, the leading American academic commentator on constitutional search and seizure issues, discusses in his landmark text *Search and Seizure: A Treatise on the Fourth Amendment* (4<sup>th</sup> ed.) at sec. 10.7(a) whether screening procedures utilized in the course of admitting patrons to the place where an athletic contest, rock concert, dance or similar public event is to be held violate the Fourth Amendment guarantee of “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures....” Although no such case has reached the Supreme Court of the United States, the majority of decisions he cites hold that the screening procedures employed are unconstitutional. What is interesting for us is the three factors the American courts consider in evaluating these screening procedures, which parallel the Canadian process of justification under the *Charter*.

The first consideration is the public necessity of the screening, which has two aspects, the seriousness of the public danger and the imminence of the public danger. Although it is indisputable that guns and bombs are vastly more serious than alcohol and drugs, the likelihood of danger in the public event situation will often be established by a history of injuries, disturbances, violence or damage. A well-documented historical record is the best way to demonstrate the threat to public safety which necessitates the screening process.

The second consideration is the likely effectiveness of the screening, the extent to which it advances the public interest. Ineffective screening will not be upheld, nor will screening which must be excessively intrusive in order to be effective.

The third consideration, the nature of the intrusion, has several aspects. First, everyone attending should be screened, with no discretion left to the inspectors in selecting whom to search or the extent of the search. Universality eliminates both any suggestion of discrimination among the entrants, and the stigma that might otherwise be felt by those chosen to be searched. Second, advance publicity, clear notices and precise warnings give everyone the opportunity to prepare for the search and allow those who are reluctant to be searched to avoid it. Third, the ability of a reluctant individual to elect to leave unsearched (even though he or she may later attempt entry elsewhere) shows that the true purpose of the screening is public safety, and not criminal investigation.

*Jensen v. Pontiac*, 113 Mich. App. 341, 317 N.W.2d 619 (1982) is one of the few cases Professor LaFave cites in which a groundless screening search was upheld. After previous incidents in which spectators were jeopardized by thrown objects, patrons seeking entry to a professional football stadium who were carrying bags large enough to contain cans or bottles were required to permit visual inspection of them. Notices were posted advising patrons this would be done, and their alternatives. Everyone entering the stadium was searched. At the entrance uniformed security guards requested permission to inspect the bags visually, and explained the patrons' options. The guards



did not order the patron to submit to the search. The guards did not touch the patrons or their property at any time; some patrons were asked to move objects within the bag to facilitate the visual inspection. The patron could dispose of any container by depositing it in a waste bin or by storing it outside the stadium, before proceeding into the stadium. If a patron refused to be searched or refused to dispose of the container, entrance was denied and the ticket price was refunded. The Court of Appeals of Michigan was satisfied that the primary purpose was public safety, not enforcement of liquor and drug laws, and that the regime was reasonable and did not violate the Fourth Amendment.

#### **D. The perimeter of the event site**

The most crucial point for inspection of the celebrants is the entrance to the event site. Often special events are held in an enclosed stadium or arena, where only those attending the event are entering, and entrants must file through a gate. The site of the Canada Day fireworks in Victoria is physically more complicated. It is the waterfront area around the Inner Harbour, which by land is reached from a number of streets, and which contains hotels within it. The fact that access is by streets means that the "gates" must be barricades, which are erected at selected intersections designed to intercept most if not all of those attending the fireworks.

The Victoria site is also more complicated operationally, because the presence of hotels means that some people who are staying in the area must pass through the barricades; their intended consumption of unopened liquor may be in their "temporary home", not a public place, and it would be undesirable from the point of view of the tourist industry to prevent or discourage them from drinking in their hotel rooms during the fireworks if they wish to do so.

Searching all entrants avoids allegations of arbitrariness and discrimination that can arise from officers randomly choosing which of many people are to be searched.

The perimeter of the exclusionary zone, and inside it, are the locations where searches on less than reasonable grounds are more likely to be upheld, because there the great majority of those present are attending the event, and the smallest proportion of non-attendees will be subject to being searched.

#### **E. Bus stops**

Legislation generally authorizing the manual and visual searching of the contents of bags and backpacks at outlying locations, without grounds, is unlikely to be justified under the *Charter*. The intrusion into the bearer's privacy is severe, and as the distance from the event site increases more and more people who are not going to it would be subject to being searched. Moreover, the existence of open wine and beer stores in downtown Victoria means that one going to the event can replace liquor seized in the outskirts before reaching the event site, thereby circumventing the purpose of the seizure. It will

be difficult to justify the multi-level “layered” search scheme to prevent liquor reaching the event site.

The focus of transit searches should be on the protection of transit property. B.C. Transit might make rules and post signs prohibiting the possession of liquor on buses on specified routes at the time of a special event, based on the history of vandalism, vomiting and damage to its buses during previous events. These rules and signs might further authorize searches of passengers and their belongings there and then, specifying the basis on which they could be conducted. A history of disproportionate damage to the vehicles at such events, when the overwhelming majority of passengers were attending the event, particularly if supplemented by the bus drivers’ observation or apprehension of drinking liquor or “trouble” on the bus might provide a sufficient basis for relaxation of the “reasonable grounds” standard.

The approach taken since 2005 effectively makes submission to a bag search a condition of travelling on certain bus routes. If B.C. Transit wishes to continue this method as a supplement to its drivers refusing admission to passengers they identify as intoxicated, it could make a rule authorizing and post signs advising of searches of passengers and their belongings, particularly those who appear to have been drinking. Those who do not appear to have been drinking would be less likely to cause damage to the vehicle.

#### **F. Roving patrols**

Legislation prohibiting possession of liquor without lawful excuse within the defined event site, and empowering a search for it there, on less than reasonable grounds, might be justified under the *Charter*, as discussed above under “The perimeter of the event site”, although inside the site the same person may be searched by different officers successively, whereas the entrance search is conducted once only.

However, legislation authorizing bag searches by roving patrols outside the event site on less than reasonable grounds are less likely to be held justifiable under the *Charter*. The farther from the site the person is, the more likely that he or she is not going to or coming from it at all. Even near the site, the existence of open wine and beer stores means that a person whose liquor has been seized can replace it en route to the event. The seizure adds a cost, which may or may not discourage the person, but does not prevent that person attempting to enter the fireworks area carrying liquor.

### **IX. CONCLUSION**

Civic events, such as Canada Day fireworks, are significant community celebrations which should be encouraged. Regrettably, a minority of participants have made these events occasions for drunkenness, which has led to rowdiness, fights, and vandalism. As a result, in British Columbia in recent years a number of such events have been cancelled,

and are no longer celebrated. The survival of others, including Canada Day in Victoria, is dependent upon the development of means to minimize the drunkenness and its consequences in order to protect the safety and enjoyment of the majority.

The Canada Day fireworks in Victoria attract a crowd of some 45,000, including families. That the great majority of them appreciate it is reflected in the attendance numbers, and that they appreciate the steps being taken to make it safe and enjoyable is shown by their acquiescence in the searches. Indeed, the complaint of one of the witnesses was not that her bag was searched, but that it was searched three times.

The police have power under the *Liquor Control and Licensing Act* to arrest those who are intoxicated in a public place (s. 41(2)), and to search those who are consuming liquor in a public place (s. 67, 40(1)), and to search a minor who is reasonably believed to be in possession of liquor (s. 67, 34(3)). The strategy that has been developed in Victoria supplements these provisions – which, on their own, proved inadequate in earlier years – with searches of bags large enough to contain cans or bottles of liquor at public transit stations, bus check points, and barricades near the Inner Harbour, as well as by roving bicycle and foot patrols.

In 2008 the early interdiction of liquor was successful operationally. These bag searches intercepted a very large quantity of liquor that would otherwise have been consumed during the fireworks festivities that day, thereby reducing the amount of drunkenness and attendant violent behaviour. Many of the searches were conducted as a random screening process, without specific grounds related to the individual. Unfortunately, at present these bag searches are legally justified only if the searching officer has reasonable and probable grounds to believe an offence is being committed, and that the bag contains evidence of it.

In order to enable the police to continue with this successful approach to the disruption of the civic celebration caused by the excessive liquor consumption of a relative few, it is necessary for the provincial government, the City of Victoria, and B.C. Transit, or one or more of them, to provide a *Charter*-compliant legislated basis for the police action.

15 Dec 2008



# Criminal Law (Consolidation) (Scotland) Act 1995

CHAPTER 39

LONDON: HMSO

**PART I**

(5) Every warrant issued under this section shall be addressed to and executed by a constable, who shall be accompanied by the parent, relative, or guardian or other person giving the information, if that person so desires, unless the justice directs otherwise.

(6) In this section, "justice" has the same meaning as in section 307 of the Criminal Procedure (Scotland) Act 1995.

1995 c. 46.

17. This Part of this Act shall not exempt any person from any proceedings for an offence which is punishable at common law, or under any enactment other than this Part, but nothing in this Part of this Act shall enable a person to be punished twice for the same offence.

Liability to other criminal proceedings.

**PART II**

**SPORTING EVENTS: CONTROL OF ALCOHOL ETC.**

18.—(1) Subject to subsection (2) below, the Secretary of State may for the purposes of this Part of this Act by order designate—

Designation of sports grounds and sporting events.

- (a) a sports ground or a class of sports ground;
- (b) a sporting event, or a class of sporting event, at that ground or at any of that class of ground;
- (c) a sporting event, or a class of sporting event, taking place outside Great Britain.

(2) An order under this section shall not apply to a sporting event at which all the participants take part without financial or material reward and to which all spectators are admitted free of charge; but this subsection is without prejudice to the order's validity as respects any other sporting event.

(3) The power to make an order under subsection (1) above shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

19.—(1) Where a public service vehicle or railway passenger vehicle is being operated for the principal purpose of conveying passengers for the whole or part of a journey to or from a designated sporting event, then—

Alcohol on vehicles.

- (a) any person in possession of alcohol on the vehicle shall be guilty of an offence and liable on summary conviction to imprisonment for a period not exceeding 60 days or a fine not exceeding level 3 on the standard scale or both;
- (b) if alcohol is being carried on the vehicle and the vehicle is on hire to a person, he shall, subject to subsection (7) below, be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale; and
- (c) any person who is drunk on the vehicle shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the standard scale.

(2) Notwithstanding section 92 of the Licensing (Scotland) Act 1976 (restriction on carriage of alcoholic liquor in crates on contract carriages), but subject to subsection (7) below, if the operator of a public service vehicle which is being operated as mentioned in subsection (1) above, either by himself or by his employee or agent permits alcohol to be carried

1976 c. 66.

## PART II

on the vehicle, the operator and, as the case may be, the employee or agent shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(3) This subsection applies to a motor vehicle which is not a public service vehicle but which is adapted to carry more than 8 passengers and is being operated for the principle purpose of conveying two or more passengers for the whole or part of a journey to or from a designated sporting event.

(4) Any person in possession of alcohol on a vehicle to which subsection (3) above applies shall be guilty of an offence and liable on summary conviction to imprisonment for a period not exceeding 60 days or a fine not exceeding level 3 on the standard scale or both.

(5) Any person who is drunk on a vehicle to which subsection (3) above applies shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the standard scale.

(6) Any person who permits alcohol to be carried on a vehicle to which subsection (3) above applies and—

(a) is the driver of the vehicle; or

(b) where he is not its driver, is the keeper of the vehicle, the employee or agent of the keeper, a person to whom it is made available (by hire, loan or otherwise) by the keeper or the keeper's employee or agent, or the employee or agent of a person to whom it is so made available,

shall, subject to subsection (7) below, be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(7) Where a person is charged with an offence under subsection (1)(b), (2) or (6) above, it shall be a defence for him to prove that the alcohol was carried on the vehicle without his consent or connivance and that he did all he reasonably could to prevent such carriage.

Sporting events:  
controls.

20.—(1) Any person who—

(a) is in possession of a controlled container in; or

(b) while in possession of a controlled container, attempts to enter, the relevant area of a designated sports ground at any time during the period of a designated sporting event shall be guilty of an offence and liable on summary conviction to imprisonment for a period not exceeding 60 days or to a fine not exceeding level 3 on the standard scale or both.

(2) Any person who—

(a) is in possession of alcohol in; or

(b) while in possession of alcohol, attempts to enter, the relevant area of a designated sports ground at any time during the period of a designated sporting event, shall be guilty of an offence and liable on summary conviction to imprisonment for a period not exceeding 60 days or to a fine not exceeding level 3 on the standard scale or both.

(3) Any person who has entered the relevant area of a designated sports ground and is in possession of a controlled article or substance at any time during the period of a designated sporting event shall be guilty of an offence.

PART II

(4) Any person who, while in possession of a controlled article or substance, attempts to enter the relevant area of a designated sports ground at any time during the period of a designated sporting event at the ground shall be guilty of an offence.

(5) A person guilty of an offence under subsection (3) or (4) above shall be liable on summary conviction to imprisonment for a period not exceeding 60 days or to a fine not exceeding level 3 on the standard scale or both.

(6) It shall be a defence for a person charged with an offence under subsection (3) or (4) above to show that he had lawful authority to be in possession of the controlled article or substance.

(7) Any person who—

- (a) is drunk in; or
- (b) while drunk, attempts to enter,

the relevant area of a designated sports ground at any time during the period of a designated sporting event shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the standard scale.

(8) In this section—

“controlled article or substance” means—

(a) any article or substance whose main purpose is the emission of a flare for purposes of illuminating or signalling (as opposed to igniting or heating) or the emission of smoke or a visible gas; and in particular it includes distress flares, fog signals, and pellets and capsules intended to be used as fumigators or for testing pipes, but not matches, cigarette lighters or heaters; and

(b) any article which is a firework.

“controlled container” means any bottle, can or other portable container, whether open or sealed, which is, or was, in its original manufactured state, capable of containing liquid and is made from such material or is of such construction, or is so adapted, that if it were thrown at or propelled against a person it would be capable of causing some injury to that person; but the term does not include a container holding a medicinal product for a medicinal purpose.

“medicinal product” and “medicinal purpose” have the meanings assigned to those terms by section 130 of the Medicines Act 1968.

21. For the purpose of enforcing the provisions of this Part of this Act, a constable shall have the power without warrant— Police powers of enforcement.

- (a) to enter a designated sports ground at any time during the period of a designated sporting event;
- (b) to search a person who he has reasonable grounds to suspect is committing or has committed an offence under this Part of this Act;
- (c) to stop and search a vehicle where he has reasonable grounds to suspect that an offence under section 19 of this Act is being or has been committed;

## PART II

- (d) to arrest a person who he has reasonable grounds to suspect is committing or has committed an offence under this Part of this Act;
- (e) to seize and detain—
- (i) with its contents (if any), a controlled container as defined in section 20(8) of this Act; or
  - (ii) with its contents, any other container if he has reasonable grounds to suspect that those contents are or include alcohol.

Presumption as to contents of container.  
1976 c. 66.

22. Section 127 of the Licensing (Scotland) Act 1976 (presumption as to contents of container) shall apply for the purposes of any trial in connection with an alleged contravention of any provision of this Part of this Act as it applies for the purposes of any trial in connection with an alleged contravention of any provision of that Act.

Interpretation of Part II.

23. In this Part of this Act, unless the context otherwise requires—

“advertised” means announced in any written or printed document or in any broadcast announcement;

“alcohol” means alcoholic liquor as defined in section 139 of the Licensing (Scotland) Act 1976;

“designated” means designated by the Secretary of State by order under section 18 of this Act, and “designated sporting event” includes a sporting event designated under section 9(3)(a) of the Sporting Events (Control of Alcohol) Etc. Act 1985;

1985 c. 57.

“keeper”, in relation to a vehicle, means the person having the duty to take out a licence for it under section 1(1) of the Vehicles Excise and Registration Act 1994;

1994 c. 22.

“period of a designated sporting event” means the period commencing two hours before the start and ending one hour after the end of a designated sporting event, except that where the event is advertised as to start at a particular time but is delayed or postponed it includes, and where for any reason an event does not take place it means, the period commencing two hours before and ending one hour after, that particular time;

1981 c. 14.

“public service vehicle” has the same meaning as in the Public Passenger Vehicles Act 1981 and “operator” in relation to such a vehicle means—

(a) the driver if he owns the vehicle; and

(b) in any other case the person for whom the driver works (whether under a contract of employment or any other description of contract personally to do work);

“railway passenger vehicle” has the same meaning as in the Licensing (Scotland) Act 1976;

“relevant area” means any part of a sports ground—

(a) to which spectators attending a designated sporting event are granted access on payment; or

(b) from which a designated sporting event may be viewed directly;



PART II

“sporting event” means any physical competitive activity at a sports ground, and includes any such activity which has been advertised as to, but does not, take place; and

“sports ground” means any place whatsoever which is designed, or is capable of being adapted, for the holding of sporting events in respect of which spectators are accommodated.

PART III

DETENTION BY CUSTOMS OFFICERS

24.—(1) Where an officer has reasonable grounds for suspecting that a person has committed or is committing an offence punishable by imprisonment relating to an assigned matter, the officer may, for the purpose of facilitating the carrying out of investigations—

Detention and questioning by customs officers.

- (a) into the offence; and
- (b) as to whether criminal proceedings should be instigated against the person,

detain that person and take him as quickly as is reasonably practicable to a customs office or other premises and may thereafter for that purpose take him to any other place and, subject to the following provisions of this section, the detention may continue at the customs office or, as the case may be, the other premises or place.

(2) Detention under subsection (1) above shall be terminated not more than six hours after it begins or (if earlier)—

- (a) when the person is arrested;
- (b) when he is detained in pursuance of any other enactment or subordinate instrument; or
- (c) where there are no longer such grounds as are mentioned in the said subsection (1),

and when a person has been detained under subsection (1) above, he shall be informed immediately upon the termination of his detention in accordance with this subsection that his detention has been terminated.

(3) Where a person has been detained under subsection (1) above, he shall not thereafter be detained under that subsection on the same grounds or on any grounds arising out of the same circumstances.

(4) Where a person has previously been detained in pursuance of any other enactment or subordinate instrument, he may not be detained under subsection (1) above on the same grounds or on grounds arising from the same circumstances as those which led to his earlier detention.

(5) At the time when an officer detains a person under subsection (1) above, he shall inform the person of his suspicion, of the general nature of the offence which he suspects has been or is being committed and of the reason for the detention; and there shall be recorded—

- (a) the place where detention begins and the customs office or other premises to which the person is taken;
- (b) any other place to which the person is, during the detention, thereafter taken;
- (c) the general nature of the suspected offence;



Queensland

# **Police Powers and Responsibilities Act 2000**

**Reprinted as in force on 1 January 2009**

**Reprint No. 6H**

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the Office of the Queensland Parliamentary Counsel  
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- (a) if the person is in the state building—the police officer may remove the person from the state building; or
- (b) if the person is about to enter the state building—the police officer may prevent the person from entering the state building.

## **Part 2                    Preserving safety for special events**

### **Division 1              Preliminary**

#### **556    Application of pt 2**

This part applies only to special events.

#### **557    Purpose of pt 2**

The purpose of this part is to state special provisions necessary for preserving public order and safety for individuals involved in special events and the safety of other individuals at special event sites.

### **Division 2              Declaration of special events**

#### **558    Declaration of special event**

- (1) A regulation may declare an event to be a special event for this part.
- (2) The regulation must—
  - (a) describe the event and the special event site; and
  - (b) state the period for which the special event declaration is in force; and
  - (c) state the places, if any, at which an authorised person may exercise specified powers under division 5; and

- (d) state anything a person is prohibited from bringing onto the special event site (*prohibited item*); and
- (e) state any restrictions that apply to access to a part of the special event site; and
- (f) state any conditions, decided by the Minister, that apply to entry to the special event site or any part of it.

### **559 Requirements for declaring special events**

Before an event is declared to be a special event, the Minister must be satisfied—

- (a) the declaration is necessary for preserving public order and the safety of individuals involved in the event and other individuals because of—
  - (i) the nature of the event; or
  - (ii) the status in the international community of persons involved in the event; or
  - (iii) the State's obligations for holding the event; and
- (b) either—
  - (i) there is a reasonable likelihood that the event may be disrupted if the powers in division 5 are not exercised; or
  - (ii) the exercise of the powers is necessary because of the need to protect persons involved in or at the event; or
  - (iii) the exercise of the powers is required as a condition of holding the event in Queensland.

### **560 Notice of declaration to be given**

- (1) As soon as practicable, but no later than 7 days after a site is declared to be a special event site, the Minister must give notice of the making of declaration and the effect of the declaration in a newspaper circulating generally in the State.
- (2) Failure to comply with subsection (1) does not invalidate the declaration.

### **Division 3                    Statutory conditions relating to entry to special event sites**

#### **561    Statutory conditions of entry**

It is a condition of entry to a special event site that an entrant to the site—

- (a) must, if asked, permit a search to be made of his or her personal property; and
- (b) must, if asked, permit a frisk search to be made of his or her person; and
- (c) must not take into or possess on the site a prohibited item.

#### **562    Statutory condition about restricted areas**

The organiser of the special event must ensure reasonable steps are taken to inform the public of the limits of a restricted area at the site, whether by signs or otherwise.

### **Division 4                    Appointment of authorised persons**

#### **563    Appointment of authorised persons**

- (1) The commissioner may appoint a person to be an authorised person for this part.
- (2) The commissioner may appoint a person to be an authorised person only if—
  - (a) the commissioner believes the person has the necessary expertise or experience to be an authorised person for this part; or
  - (b) the person has satisfactorily completed a course of training approved by the commissioner.
- (3) The appointment—

*Police Powers and Responsibilities Act 2000*

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- (a) must state the powers the authorised person may exercise under this part and when and where they may be exercised; and
- (b) may limit the powers of the authorised person by stating conditions in the instrument of appointment.

*Example for subsection (3)(b)—*

The commissioner may impose a condition requiring the authorised person to comply with any reasonable direction of a police officer.

**564 Identity card**

- (1) The commissioner must give each authorised person an identity card.
- (2) However, if the event is organised by someone other than the State, the commissioner may require the event organiser to issue the identity card.
- (3) The identity card must—
  - (a) contain a recent photograph of the authorised person; and
  - (b) be signed by the person; and
  - (c) identify the person as an authorised person for this part; and
  - (d) include an expiry date; and
  - (e) state a unique number.
- (4) A person who ceases to be an authorised person must return the person's identity card to the commissioner or, if the identity card is issued by an event organiser, the event organiser, as soon as practicable (but within 21 days) after the person ceases to be an authorised person, unless the person has a reasonable excuse.

Maximum penalty for subsection (4)—10 penalty units.

**565 Production or display of authorised person's identity card**

- (1) An authorised person may exercise a power in relation to someone else only if—

- (a) the authorised person first produces his or her identity card for the person's inspection; or
  - (b) the authorised person has the person's identity card displayed so it is clearly visible to the other person.
- (2) However, if for any reason it is not practicable to comply with subsection (1) before exercising the power, the authorised person must produce the identity card for inspection by the person as soon as it is practicable.

## **Division 5 Powers for special event sites**

### **566 Power to require reasons for entry to special event site**

- (1) A police officer or an authorised person may ask an entrant to a special event site to state the person's reason for being in, or about to enter, the site.
- (2) If the person fails to comply with the request, the police officer or authorised person must warn the entrant the entrant may be prevented from entering the site or removed from the site, unless the entrant has a reasonable excuse.
- (3) This section applies to an authorised person only if a condition of the person's appointment states this section applies to the person.

### **567 Use of electronic screening devices at special event site**

- (1) This section applies if the security system for a special event site involves the use of 1 or more of the following electronic screening devices—
  - (a) a walk-through detector;
  - (b) an X-ray machine;
  - (c) a hand held scanner.
- (2) A police officer or an authorised person may ask an entrant to the site to do 1 or more of the following—
  - (a) to walk through a walk-through detector;

- (b) to pass the entrant's belongings through an X-ray machine;
- (c) to allow the police officer or authorised person to pass a hand held scanner in close proximity to the entrant;
- (d) to allow the police officer or authorised person to pass a hand held scanner in close proximity to the entrant's belongings.

**568 Police officer or authorised person may ask entrant to remove outer garment etc.**

- (1) This section applies if—
  - (a) a police officer or authorised person (*security official*) reasonably considers it necessary to make a request under subsection (2) in relation to an entrant or the entrant's belongings, whether or not the entrant or belongings have been subjected to electronic screening; and
  - (b) the security official tells the entrant the reason for making the request.
- (2) The security official may ask the person to do 1 or more of the following—
  - (a) allow the official person to inspect the entrant's belongings;
  - (b) remove 1 or more outer garments worn by the entrant as specified by the official and allow the official to inspect the garments;
  - (c) remove all articles from the entrant's clothing and allow the official to inspect them;
  - (d) open an article for inspection and allow the official to inspect it;
  - (e) open a vehicle or a part of it for inspection and allow the official to inspect it;
  - (f) remove an article from the vehicle as specified by the official and allow the official to inspect it.



- (3) An official may touch a garment the entrant is wearing only if the official is the same sex as the entrant.
- (4) This section applies to an authorised person only if a condition of the person's appointment states this section applies to the person.
- (5) In this section—  
*inspect*, an article, includes handle the article, open it and examine its contents.

### **569 Frisk search of persons**

A police officer may ask an entrant to a special event site to permit a frisk search to be made of his or her person.<sup>21</sup>

### **570 Refusal of entry to and removal from site**

- (1) This section applies if—
  - (a) an entrant fails to comply with a request made under this division; or
  - (b) an entrant fails to satisfy a police officer or an authorised person that the entrant has a good and lawful reason to be at the special event site or a particular part of it; or
  - (c) a police officer or an authorised person reasonably suspects an entrant has contravened a provision of division 6.
- (2) Unless the entrant is arrested for a contravention of division 6 or section 791—
  - (a) if the entrant has entered the special event site—a police officer or an authorised person may remove the entrant from the site; or
  - (b) if the person is about to enter the special event site—a police officer or an authorised person may prevent the person from entering the site.

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<sup>21</sup> See section 624 (General provision about searches of persons).

**Division 6                      Offences****571      Unauthorised entry to a special event site**

A person must not enter or remain in a special event site unless the person—

- (a) has paid any entry fee; or
- (b) has the consent of the event organiser; or
- (c) is otherwise authorised to enter or remain at the site.

Maximum penalty—10 penalty units.

**572      Unauthorised entry to a restricted area**

A person must not enter or remain in a restricted area at a special event site, unless the person has a reasonable excuse.

Maximum penalty—10 penalty units.

**573      Interference with a special event**

A person must not, at a special event site—

- (a) disrupt, interfere with, delay or obstruct the conduct of the special event or an activity associated with the special event; or
- (b) interfere with the reasonable enjoyment of the special event or an activity associated with the special event.

Maximum penalty—40 penalty units.

**574      Prohibited items**

A person must not take a prohibited item onto, or possess a prohibited item on, a special event site, unless the person has a reasonable excuse.

Maximum penalty—10 penalty units.

**575 Assault etc. of authorised person**

- (1) A person must not assault or obstruct an authorised person exercising a power under this part.

Maximum penalty—40 penalty units.

- (2) In this section—

*assault* has the meaning given by the Criminal Code, section 245.

*obstruct* includes hinder, resist and attempt to obstruct.

**Part 3 Powers relating to noise****Division 1 Noise abatement direction****576 Application of pt 3**

- (1) This part applies to an environmental nuisance caused by noise of a kind mentioned in section 578(1)(b), 579(1)(b) or 580(1)(b) or (2)(b) that is audible at or near any residential or commercial premises and is excessive in the circumstances.
- (2) However, this part does not apply to an environmental nuisance caused by noise emitted from a place—
- (a) while being used for an open-air concert or commercial entertainment; or
  - (b) by a public meeting under a permit under a law authorising the amplification or reproduction of sound by—
    - (i) any electrical or mechanical appliance, apparatus or device; or
    - (ii) another way; or
  - (c) while the place is being used by motor vehicles under a permit under a law.

# West Shore Detachment Operational Plan Canada Day 2008

## History:

Last year West Shore Detachment worked hard to prevent liquor laden youth and rowdies from boarding BC Transit buses. In the past there have been numerous issues with youth and alcohol, especially when they arrived at the downtown core of Victoria. The effort put forth last year brought praise from both BC Transit and Victoria PD. It is the goal of West Shore Detachment to continue this high standard of preventative policing and assist our neighboring jurisdictions.

Along with this preventative effort, West Shore members will be tasked with patrolling the beaches at such locations as Thetis Lake and the Lagoon to ensure this night remains "family" friendly.

## Situation:

This year, as in others, it is expected that a large number of people will leave the West Shore area via public transit and proceed to the downtown core of Victoria for the Canada Day celebrations. These individuals have historically brought alcohol and other intoxicants for consumption during the Canada Day events. The forecast is predicted to be high temperatures and sunny skies. This will no doubt bring out our youth in great numbers.

BC Transit has written a letter requesting police presence and assistance in ensuring the safety of all passengers and staff. This request is as follows...

*"BC Transit is requesting that the West Shore RCMP on July 1<sup>st</sup>, 2008 assist in maintaining order by boarding our buses traveling to or from the event when requested, to remove liquor and or the offenders where necessary. BC Transit will be posting notices and providing information to the public prior to the event advising that consumption of liquor, possession of alcohol by minors or unsafe conduct on our buses on July 1<sup>st</sup>, 2008 will not be allowed."*

Other concerns are the increased attendance to areas such as the Lagoon and Thetis Lake Park. With the weather predicted to be hot temperatures and clear skies, there is no doubt the calls to service will be increased in these areas.

The Victoria PD, Saanich PD, and the Integrated Road Safety Unit will be conducting large road blocks on almost all main entrances into the downtown core of Victoria. There will also be a large contingent of foot/bike patrol members working in the areas of the Canada Day

celebrations. West Shore members may be requested to assist these members, especially at the roadblocks bordering West Shore Detachment area.

**Plan:**

Foot patrols and bike patrols have been tasked for the monitoring the bus stops at the Juan de Fuca Recreational Centre and the West Shore Town Centre. Regular members are to pair up with Auxiliary Constables to maximize effectiveness. These members have been called in to supplement the watch and allow the watch to respond to calls outside these areas. Once the peak travel times for transit have passed, the overtime members and auxiliaries will be tasked with patrolling the local beaches, parks, and hot spots.

BC Transit has supervisors who will patrol the various bus routes and identify problems observed. Our members may get a request to assist with the stopping of a transit bus and removal of problem riders. The drivers will be aware of the increase police presence and make every effort to pull the bus over at a safe site.

West Shore can expect a return of people from the downtown core of Victoria. This is likely to occur around 0100hrs. Victoria and Saanich PD have advised that should West Shore be flooded with unruly youth, they are prepared to assist. All members brought in on overtime to police this event are to check with the Watch Commander before leaving.

Large gathering of youth are to be monitored and dealt with before the situation grows to an unmanageable level. Any bylaw issues are to be reported to the local bylaw members. It is expected that each municipality with bylaw enforcement officers will be represented this evening.

**Resources / Patrol Areas:**

**Tuesday, July 1<sup>st</sup>, 2008:**

**"D" Watch (1830-0630)**

- |                          |                                |               |
|--------------------------|--------------------------------|---------------|
| <input type="checkbox"/> | Cpl. Brayley - Watch Commander | Vehicle _____ |
| <input type="checkbox"/> | Cst. Falconer                  | Vehicle _____ |
| <input type="checkbox"/> | A/Cst. Gallop                  | Vehicle _____ |
| <input type="checkbox"/> | Cst. Richard                   | Vehicle _____ |
| <input type="checkbox"/> | Cst. Thomas                    | Vehicle _____ |

**Traffic**

- |                          |                           |               |
|--------------------------|---------------------------|---------------|
| <input type="checkbox"/> | Cst. Walker (1400-2400)   | Vehicle _____ |
| <input type="checkbox"/> | Cst. Dussault (1000-2000) | Vehicle _____ |
| <input type="checkbox"/> | Cst. Ellis (1400-2400)    | Vehicle _____ |

**Watch Overlap "D" Watch 1830 - 2030 hrs.**

- Cst. Hernandez Vehicle \_\_\_\_\_
- Cst. Bernardo Vehicle \_\_\_\_\_
- Cst. Delmonico Vehicle \_\_\_\_\_
- Cst. Floyd Vehicle \_\_\_\_\_
- Cst. Narraway. Vehicle \_\_\_\_\_

**Bike Patrol 1800-0200**

- Cst. Wallace // A/Cst. \_\_\_\_\_ (West Shore Town Centre)
- Cst. Doke // A/Cst. \_\_\_\_\_ (Juan de Fuca Centre)

**Foot Patrol 1800-0200**

- Cst. \_\_\_\_\_ // A/Cst. \_\_\_\_\_ (West Shore Town Centre)
- Cst. Todd // A/Cst. \_\_\_\_\_ (Juan de Fuca Centre)

**Tactical Considerations:**

This plan is subject to change and is to be adapted to deal with any unforeseen incidents. Should the need for additional resources be required, the Watch Commander will take steps to ensure any needs are filled. Members are encouraged to work with site security to allow early intervention of any issues that may arise.

**Media:**

Any events requiring media contact will be handled by the Watch Commander of the day. If the event is such that a large media presence is expected, consideration should be given utilizing the Detachment Media Liaison person, Cpl. Sutherland.

**(M. Legassicke)S/Sgt.  
Operations NCO  
West Shore Detachment**

# Celebrate Canada Day Safely



To ensure everyone's safety on July 1, customers are reminded that consumption of liquor or open liquor on board buses is not tolerated.

At BC Transit's request, police will monitor all buses entering downtown to enforce this safety regulation.

Transit Conduct & Safety Regulation Order Council #2191

# Celebrate Canada Day Safely



To ensure everyone's safety on July 1, customers are reminded that the consumption of liquor or open liquor on board buses is not tolerated.

At BC Transit's request, police will monitor all buses entering downtown to enforce this safety regulation.

Please note that buses operate on the Sunday service schedule on Canada Day, Sunday, July 1.

7181



Transit Conduct & Safety Regulation  
Order Council #2191

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