Law Society of Saskatchewan
Continuing Professional Development

Update and Trends in Drinking and Driving Law

Ronald P. Piché

Piché & Company

Webinar: Update and Trends in Drinking and Driving Law
Wednesday, May 28, 2014

LATEST DEVELOPMENTS IN THE DEFENCE OF IMPAIRED/.08 CASES

PICHÉ & COMPANY
Barristers and Solicitors
204 – 611 University Drive
SASKATOON, Saskatchewan
S7N 3Z1

Lawyer: Ronald P. Piché

1. The expression “circling the wagons” is not one that criminal defence lawyers often hear. But, regrettably, that seems to be the recent trend in the domain of driving while impaired defence work. In short, it has been my experience that sure-fire arguments that once succeeded aren’t being met with the same positive results. In fact, courts have shown a reluctance to accept defence arguments in many aspects of the “usual” impaired driving investigation. The good news is that, if indeed the wagons have been circled, it may be a matter of time before the circle is broken. In short, these are often cyclical matters. Or, to borrow another metaphor, the pendulum will swing back in due course.

INITIAL STOP

2. With that, let’s examine the latest developments, working our way from the initial stop to the treatment of the accused once breath samples are obtained or a refusal charge has been laid. It was not that long ago that our court of appeal in *Queen v. Iron 1987 SKCA 2866 (CanLII)* placed considerable restrictions on the authority of police to stop motorists. The court ruled that random stops were arbitrary within the meaning of s. 9 of the *Charter of Rights*. The majority in that case also found that the breach was not saved by s. 1 of the *Charter*. Shertobitoff, J.A. found that “the random stop of the appellant was a violation of his right not to be arbitrarily detained, and was authorized neither by statute nor common law. The limit on the right, therefore, was not prescribed by law, and the Crown does not have access to s. 1. Even if there was legal authority for the random stop, contrary to the view I have taken, the result in this case would be the same.”

3. Of course, the days of *Iron* are long behind us. In *Queen v. Houben (2006) SKCA 129*, the focus became s. 209.1 of the *Traffic Safety Act* and subsequent amendments to that legislation which purport to confer added powers to police. *Houben* involved two Saskatoon City Police officers who were on routine patrol in a residential neighborhood when they decided to stop a pickup truck. The officers thought they had seen the vehicle on three other occasions travelling in different directions. Once stopped, the arresting officer observed indices of impairment and the investigation ensued. The accused was later charged with operating a motor vehicle while over .08.

4. As part of the case history, the trial judge agreed with defence that the accused had been arbitrarily detained and that the police were engaged in "preventative policing" or ruling out suspicious behavior. On appeal to the Summary Conviction Appeal Court, Laing, J. found no error. He ruled that police did not have traffic safety reasons in mind when the stop was made. The issue then turned to whether police had "articulable cause" as set out in *Queen v. Mann 2004 SCC 55 (CanLII)*. Already having found that the then *Highway Traffic Act* had no applicability, he indicated police had "no reason to believe he (Houben) had committed an offence or was involved in an ongoing offence.

5. After disposing of some preliminary issues, the court of appeal then began its analysis of arbitrary detention in the context of vehicle stops. There was no doubt, in the court's view, that the stop involved some form of detention. The question sought to be addressed was whether there were reasonable grounds to detain (referred to in earlier cases as "articulable cause.") Jackson, J.A. examined the power of detention where the stop and detention were unrelated to the operation of the vehicle or other road safety reasons. The

issue became: Does the common law authorize such a detention? In answering that question, the court referred to *Queen v. Waterfield (1963) 3 All E.R; 659, Queen v. Dedman (1985) 2 S.C.R. 2.* and *Queen v. Simpson (1995) 1 SCR 449 (CanLII).* The court observed that caution must be exercised where police are operating on a "hunch" and there must be objective criteria so as to avoid "mere speculation." In *Simpson,* the court concluded that the police officer had no reason to suspect the accused or the driver of the car was involved in criminal activity. As there was no articulable cause, the common law police power did not authorize his conduct and it was unlawful. This court also referred to *Mann supra* and the powers to detain for "investigative purposes." The conclusion was summarized as follows:

> *"Police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary."*

The court ruled that the *Highway Traffic Act* didn't confer the authority to stop a vehicle on the basis of something less than reasonable grounds. The court in *Houben* succinctly summed up its position as follows:

> *"If a police officer has a suspicion that a driver is involved in criminal activity, unrelated to traffic enforcement, such that he or she would like to stop a motor vehicle, the suspicion must meet the test in Mann.*
>
> *If the law were otherwise and a police officer could stop a motor vehicle for a mere suspicion short of 'reasonable grounds to detain' and then say that he or she had been exercising the power under s. 40(8) simply because that power exists, all stops could become those to check out suspicious activity. The police officer could stop anyone at any time on the basis of suspicion. At least in the context of motor vehicle stops, there*

> *would be no reason to have created a power to stop to 'reasonable grounds to detain.'"*

6. Fast forward to more recent treatment of powers to arrest. In *Queen v. Papilion,* RCMP Const. Nordick was patrolling alone in a marked police vehicle in the town of Warman. At approximately 2:00 a.m., he was in a residential neighborhood and noted an SUV coming north towards him and then turned west along a residential street adjacent to the side of a small park. It was Const. Nordick's stated view that the motorist would have been able to recognize the vehicle as an RCMP cruiser based on the markings on the side of the car.

7. The officer then briefly lost sight of the SUV after it had turned west. The officer turned to pursue the vehicle but did not see it. He did observe a similar vehicle parked on the north side of the street. It was not running and had no lights on. Const. Nordick drove passed the vehicle and saw a male person who appeared to be reclined in the driver's seat. The individual was said to have poked his head up to look through the driver' side window or window opening. The summary conviction court judge, in his decision, adopted the description that he "then put his head back down as if attempting to avoid being seen by the police vehicle." Const. Nordick then stopped his vehicle, backed up, and parked behind the suspect vehicle. He approached the driver's side and observed two individuals. The appellant was in the driver's seat and a female was seated in the passenger seat. A smell of alcohol was emanating from inside the vehicle. At trial, the judge found the reason for the stop to be Const. Nordick made the initial stop of the vehicle because of the (1) the time of day; (2) problems the RCMP were having in and around the park during that period (3) the suggestion that the suspect vehicle had pulled

over immediately after passing the police vehicle and (4) the suggestion that the accused may have been trying to hide from the officer by reclining his seat. Const. Nordick was not in this case checking for sobriety, licence, ownership, insurance, or mechanical fitness of the vehicle. He stopped the vehicle because "he thought things were odd." (writers emphasis). Mr. Papilion was not doing anything wrong and no laws were being broken. He concluded that the stop was arbitrary and constituted a breach of s. 9 of the *Charter*.

8. The learned summary conviction appeal court judge indicated in his decision that it was at the point where the officer asked for licence and registration that the appellant was detained. He expressly rejected the suggestion that the detention commenced when the accused stopped the vehicle. Koch, J. ruled as follows: "Exactly why Cst. Nordick stopped, backed up and approached the driver's side of the SUV is not critical. He had the unfettered right to do that in the exercise of his responsibilities pursuant to s. 209.1 of *The Highway Traffic Act*, S.S. 1986, c. H-3.1, to enforce the provisions of that Act." This was his finding notwithstanding the fact that the evidence clearly pointed to the sort of preventative policing denounced by our highest court.

9. The matter went to Court of Appeal. While the court specifically addressed in oral comments that the summary conviction appeal court judge was not correct in describing the "unfettered right" to do what the police did, they then turned to the issue of what constitutes a detention. Herauf, J.A. for the majority ruled that there was no detention at the time the police approached and parked behind the suspect vehicle. He stated that the

officer did not pull over the vehicle, did not engage his police lights, nor did he block the vehicle's exit path. He concluded:

> *"In light of the conclusions the Supreme Court reached on the facts in Grant and Suberu, Mr. Papilion was not detained at the point that Const. Nordick parked his vehicle behind Mr. Papilion's vehicle. The detention took place no earlier than at the point Const. Nordick presented himself at the window of the Explorer and began asked questions. A reasonable person at that point would not have felt that they were free to leave."*

It is respectfully submitted that one questions how many motorists would simply drive away in circumstances when a police cruiser pulls behind him or her.

ASD DEMAND

10. All right. The police have stopped your client. The investigation then typically proceeds to the following possible options. The officer will conduct an Approved Screening Device demand or proceed straight to the s. 254(3) breath demand. Proving the lawful grounds for the ASD is not usually a complex process. All the Crown needs to prove is that the officer reasonably suspected that the motorist was driving a motor vehicle and had alcohol in his body. It used to be that there was a requirement that the driving be contemporaneous with the demand. In other words, an ASD sample from someone who was found standing around his vehicle (and not in care or control) after having ceased driving for a not insignificant period of time was arguably inadmissible. The strength of that argument has been weakened considerably with amendments to the *Criminal Code* that have deleted the "contemporaneity" requirement.

11. Nonetheless, our courts continue to seriously treat the requirement that the Crown prove, on an objective basis, that the officer reasonably suspected the driver had alcohol in his body. Our court of appeal in *Queen v. Butchko* has made clear that all that is required is that there be an odour of alcohol on the breath of the accused. The more difficult fact scenario arises when there is no odour from the breath but other indices that may reasonably lead to that belief. The Court of Appeal has answered that question as well and, arguably, has reduced an already low test with respect to the belief required. In *Queen v. Yates (2014) SKCA 52,* police followed a vehicle and observed it move from left lane to right lane and immediately back. Police stopped the vehicle and approached the driver's side window. The officer observed glossy and somewhat bloodshot eyes and could smell alcohol from within the vehicle. After the demand had been made, the officer noted the smell on the accused's breath.

12. The trial judge ruled that the grounds were insufficient to reasonably suspect there was alcohol in the accused's person. The summary conviction appeal court judge agreed, stating that "unless the Court has the facts to infer that the source of the alcohol smell emanating from the respondent's vehicle was from the respondent, the alcohol smell is not a factor to be taken into account in determining the objective reasonableness of the police officer's suspicion." On appeal, however, the majority ruled that the judges in the courts below had erred (with a strong dissent from Jackson, J.A.). Klebuc, J.A., for the majority, ruled that all the Crown needs to prove is a reasonable suspicion that the driver *possibly* had alcohol in his or her body. There is no requirement of direct proof of the suspect having alcohol in his or her body. The majority also concluded that the failure to directly smell alcohol on the suspect's breath is not fatal to the belief. It is respectfully

submitted that one can question how a test of "possibly" equates with a test of reasonable suspicion.

S. 254(3) DEMAND

13. With respect to the grounds to make the 254(3) breath demand, the court of appeal waded in on this issue not so long ago in *Queen v. Gunn*. The facts as found by the trial judge can be summarized as follows:

- The vehicle sat at a stop sign for six to eight seconds, seeming to wait for the officer to go first;
- During a distance of 200 metres, the vehicle made an awkward right hand turn, almost going up onto the curb, and failed to straighten out immediately;
- The vehicle travelled some time down the middle of the road.
- Driving late at night at night at a time when bars close
- Appearing to drive without a destination or to avoid the police officer
- Eyes were glassy and bloodshot,
    - Speech was slurred though the officer could not be specific about any words
    - Odour of liquor on his breath.

The following was also noted from the arresting officer's testimony, and the balance of the evidence:

- The accused retrieved his driver's licence and registration without difficulty;
- The accused alighted from his truck without difficulty,
- The accused understood the information he was given regarding the warning and rights to counsel and was cooperative throughout
- The accused pulled over appropriately
- It was late at night and there were other explanations for glassy and bloodshot eyes;

- There were other explanations possible for the manner of driving, hesitating at the stop sign and driving below the speed limit, including being uncertain of one's destination in a residential neighbourhood.

While the trial judge and the summary conviction appeal court judge agreed that these facts did not give rise, objectively, to reasonable grounds, the court of appeal overturned the decision. Caldwell, J.A., writing for the majority, ruled that the courts below applied a burden of proof which was higher than that required at law. In this court's view, the error was to "raise the standard to that of a *prima facie* case or of a greater probability" rather than reasonable grounds.

14. As part of its decision, the court of appeal also, if not expressly, implied that it was an error for the trial judge to consider what was <u>not</u> observed by the officer who makes the demand. In other words, it was wrong to weigh the exculpatory indices with the inculpatory indices in assessing reasonable grounds. There is a strong argument that this view is significantly undermined with the recent case of *Queen v. Chehil 2013 SCC 49 (CanLII)*. While that case dealt with the definition of "reasonable suspicion," its findings are apposite the discussion on "reasonable grounds." The accused in that case was charged with transporting illegal drugs. Based on a number of factors, such as the fact that the accused had a one way ticket, he was travelling alone, and paid cash for his ticket, police utilized a sniffer dog. The court was left to decide whether there was a reasonable suspicion to investigate the accused by using the sniffer dog.

15. In examining what constitutes reasonable suspicion, the court noted the following:

> *"A constellation of factors will not be sufficient to ground reasonable suspicion where it amounts merely to a "generalized" suspicion that would capture too many innocent people. Exculpatory, neutral or*

> *equivocal information cannot be disregarded when assessing a constellation of factors. However, the obligation of the police to take all factors into account does not impose a duty to undertake further investigation to seek out exculpatory factors or rule out possible innocent explanations. While the police must point to particularized conduct or particularized evidence of criminal activity in order to ground reasonable suspicion, such evidence need not itself consist of unlawful behaviour or evidence of a specific known criminal act."*

In short, *Chehil* suggests that the court is compelled to weigh "exculpatory, neutral, or equivocal information.

RIGHTS TO COUNSEL UNDER S. 10(b)

16. The suspect has now been arrested and provided his rights to counsel. The issue of s. 10(b) under the *Charter of Rights* in the context of breath sample or refusal cases could occupy its own hour in this presentation. Suffice to say that the case of *Queen v. Willier (2010) SCC 37* continues to bind the lower courts. In *Willier,* the Supreme Court outlined the duties required of a police officer who arrests or detains a person. The court said the following:

> *The purposes of s. 10(b) serve to underpin and define the rights and obligations triggered by the guarantee. In Bartle, Lamer C.J. summarized these rights and obligations in terms of the duties imposed upon state authorities who make an arrest or effect a detention section 10(b) requires the police:*
>
> *(1) To inform the detainee of his or her right to detain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel;*
>
> *(2) If a detainee has indicated a desire to exercise this right to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances)*
>
> *(3) To refrain from elicting evidence from the detainee until he or she has had that reasonable opportunity*

17. The so-called typical scenario that arises in these cases is where an accused voices a desire to contact a specific lawyer. Often, police will assist the accused in trying to reach that lawyer. (Often, the issue becomes how diligent was the accused and how much assistance did the police lend). *Willier* simply suggests that where the lawyer cannot be reached and the accused avails himself or herself of Legal Aid or duty counsel suggests, there is no s. 10(b) breach. It should be noted that in *Willier* the court specifically noted that the accused was not told he could not wait to hear back from his lawyer, or that duty counsel was his only recourse. Further, the court specifically mentioned that there was no indication that his choice to call duty counsel was the product of coercion. The court stated that:

> *"The police had an informational duty to ensure that the accused was aware of the availability of duty counsel, and compliance with that duty did not interfere with his right to a reasonable opportunity to contact counsel of choice. The accused was properly presented with another route by which to obtain legal advice, an option he voluntarily chose to exercise."*

18. Notwithstanding *Willier,* it remains clear that rights to counsel remain a right that has attained a somewhat higher "status." Or, to the use the Supreme Court's description, s. 10(b) rights are the "key to the constitution." Recent examples of the high standard applied are *Queen v. Turnmire (2014) SKPC 2 (CanLII)* where the court held that police must contact a third party if the detainee is genuine in reaching someone to assist in exercising s. 10(b) rights. Similar views were recently taken in *Queen v. O'Connor (2013) SKQB 292* and *Queen v. Ferris.*

CONTINUED DETENTION

19. There was a time when the unwarranted and continued detention of an accused after providing breath samples resulted in a stay of proceedings pursuant to s. 24(1) of the *Charter of Rights.* The argument involved a review of s. 497 and 498 of the *Criminal Code* which set out the powers to detain in cases where there were no warrants for the arrest of the accused. It often became clear in these cases that the local police detachment had no real policy or practice with respect to release. In fact, the officer charged with the responsibility of deciding release was often completely unaware of the s. 497 and s. 498. Having found a breach of s. 9, the courts often struggled with the remedy. A reduction in the fine amount in most cases seemed an inadequate remedy. The court often noted that the real issue was the punitive aspect of the driving prohibition. In the end, they often resolved the matter by imposing a stay, which was viewed as the most appropriate remedy. Implicit in their deliberations was that depriving an individual of his or her own liberty without lawful basis was unacceptable in our society. *Queen v. Fox (2007) SKPC 61, Queen v. Holbrook (2008) SKPC 133,* and *Queen v. Bender (2002) SKPC - Unreported* were just some of the cases which were resolved in this fashion.

20. That approach changed in *Queen v. Salisbury* when our court of appeal ruled that a stay in circumstances involving the continued detention of an individual for seven or eight hours was an excessive remedy. The court did not disturb the finding that there was a breach but opined that a reduction in sentence was more appropriate. It should be stressed that the remedy of a stay remains available and has been ordered in at least one case post *Salisbury.* In *Queen v. Whitford (2011) SKPC - Unreported,* the accused was detained

after providing breath samples. He had suffered a badly sprained ankle just prior to his arrest and had made it known to the RCMP members at the detachment in question. Nothing was done to assist him and no medical treatment was sought. The accused suffered some pain throughout the night and immediately attended to a medical clinic upon his release in the morning. The presiding judge ruled in those circumstances that a stay was the only appropriate remedy. As such, it may seem that, while the continued detention in and of itself may not support a stay, additional factors that compound the breach might be sufficient.

21. One of the questions that now looms is whether future remedies may include a reduction in the driving prohibition. It should be noted that our court of appeal in *Salisbury* did not pronounce on the issue of a reduction in the driving prohibition. It said only that the remedy of a stay in these circumstances was excessive. Acknowledging that the *Criminal Code* sets out a mandatory minimum one-year driving prohibitions for a first conviction, it is open for the accused to argue by analogy as follows. The courts have often ordered jail terms less than the mandatory minimum set out in the *Criminal Code* on the basis of *Charter* considerations, concluding that the mandatory minimum jail sentences can be excessive in certain cases and in breach of *Charter* protected rights. It should be pointed that this argument does not challenge the constitutionality of the statutory minimum driving prohibitions but seeks a 24(2) remedy for the overholding breach. The applicant/accused would simply be arguing that the evolution of the law in this area compels the court to address the remedy of a serious breach, such as overholding, by imposing a reduction of the driving prohibition. This reflects a fair and reasonable remedy, being less than an outright stay and more than a fine reduction of a few hundred

dollars. The analogy involves cases where the courts have disregarded the minimum jail sentences where the Crown files notice to seek greater punishment. The following are examples where, for *Charter* reasons, the courts have not imposed a minimum jail sentence:

R. v. Leonard Svennes 2011 (Unreported) Sask. PC
R. v. Sanghera (2002) O.J. No. 173 (Ont. Crt. of Justice)
R. v. Mohla (2008) ONCJ 675 (CanLII)
R. v. Sever (2006) ONCJ 138 (CanLII)