LESA Seminar – September 22, 2012 – Calgary

Impaired Driving – The Changing Landscape

"Just like that time you got sent to the principal's office."

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INTRODUCTION

Section 9 of the Charter of Rights and Freedoms states that "Everyone has the right not to be arbitrarily detained or imprisoned." The focus of most impaired driving cases is on the first detention and reasonable grounds for stopping the motor vehicle. A person's freedom and the society goal of public safety is the focus of this section.

According to section 12 of the Charter of Rights and Freedoms, "everyone has the right not to be subjected to any cruel and unusual treatment or punishment." In this section, post-breathalyser detention is grounds for a section 9 and section 12 argument.

SECTION 9

What is the Purpose of Section 9 of the Charter?

The Supreme Court in R. v. Grant, [2009] S.C.J. No 32 at paragraph 20, explains the purpose of s.9 of the Charter:

"The purpose of s. 9, broadly put, is to protect individual liberty from unjustified state interference..."[L]iberty", for Charter purposes, is not "restricted to mere freedom from physical restraint", but encompasses a broader entitlement "to make decisions of fundamental importance free from state interference". Thus, s. 9 guards not only against unjustified state intrusions upon physical liberty, but also against incursions on mental liberty by prohibiting the coercive pressures of detention and imprisonment from being applied to people without adequate justification. The detainee's interest in being able to make an informed choice whether to walk away or speak to the police is unaffected by the manner in which the detention is brought about."

The court further states in paragraph 21:

"Once detained, the individual's choice whether to speak to the authorities remains, and is protected by the s. 10 informational requirements and the s. 7 right to silence."

What is "Detention"?

The Supreme Court of Canada states what makes up "detention" in R. v. Grant. The following summary set out in paragraph 44:

1. Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention

is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

2. In cases where there is no physical restraint or legal obligation, it may not be clear whether [page385] a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, inter alia, the following factors:

(a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focused investigation.

(b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

(c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

R. v. Mann [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308 at paragraph 19 states:

"Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the Charter, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the Charter are not engaged by delays that involve no significant physical or psychological restraint. In this case, the trial judge decided the appellant was detained by the police when they searched him. We have not been urged to revisit that conclusion and, in the circumstances, I would decline to do so.'

Judge Fradsham in R. v. Reid, 2012 ABPC 109 (CanLII), considered the actions of the police "boxing in" a vehicle in a parking lot to be considered detention for the purpose of s.9:

"I find that the accused was detained (as that word is used in s. 9 of the Charter) when the police vehicle was positioned directly behind the accused's vehicle for the purpose of preventing that vehicle from being moved."

What is "Arbitrary"?

Set out broadly, R. v. Cayer, [1988] O.J. No. 1120 (C.A.), leave refused [1988] S.C.C.A. No. 370 states that:

"An arbitrary detention is a detention which is capricious, despotic or unjustifiable." A

somewhat recent case from the Supreme Court of Canada, R. v. Clayton [2007] S.C.J. No. 32, explains arbitrary detention at paragraphs 20 and 21:

"[A] detention which is found to be lawful at common law is, necessarily, not arbitrary under s. 9 of the Charter. A search done incidentally to that lawful detention will, similarly, not be found to infringe s. 8 if the search is carried out in a reasonable manner and there are reasonable grounds to believe that police or public safety issues exist.

According to common law, police powers of detention needs state justification with liberty interference. The focus is on whether the interference with liberty is necessary with the risk and the liberty at stake or if it is no more intrusive to liberty that necessary with justification equal to fundamental rights.

The Supreme Court revisits this idea in R. v. Grant at paragraph 55 and 56:
Earlier suggestions that an unlawful detention was not necessarily arbitrary (see R. v. Duguay 1985 CanLII 112 (ON CA), (1985), 18 C.C.C. (3d) 289 (Ont. C.A.)) have been overtaken by Mann, in which this Court confirmed the existence of a common law police power of investigative detention. The concern in the earlier cases was that an arrest made on grounds falling just short of the "reasonable and probable grounds" required for arrest should not automatically be considered arbitrary in the sense of being baseless or capricious. Mann, in confirming that a brief investigative detention based on "reasonable suspicion" was lawful, implicitly held that a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s.

... [F]or a detention to be non-arbitrary, it must be authorized by a law which is itself non-arbitrary. We add that, as with other rights, the s. 9 prohibition of arbitrary detention may be limited under s. 1 by such measures "prescribed by law as can be demonstrably justified in a free and democratic society""

In R. v. Reid, Judge Fradsham sums up what makes a detention arbitrary at paragraph 37 to 39:

“A detention may be arbitrary either because the law pursuant to which the detention was effected was itself arbitrary, or because the power granted by the law was applied in an arbitrary fashion. A detention not authorized by law has been determined to be inherently arbitrary.

Actions of the officers in detaining him did not come within the provisions of the law which the officers purported to invoke, and that, as a consequence, his detention was arbitrarily because his detention was not authorized by law.”

VEHICLE STOPS FOR TRAFFIC REGULATION
Driving as a Regulated Activity

There is a difference between the general concept of liberty, and that of the "liberty" of

movement that involves a vehicle. R. v. Orbanski; R. v. Elias [2005] S.C.J. No. 37, at paragraph 24 explains:

"This Court has recognized that, while movement in a vehicle involves a "liberty" interest in a general sense, it cannot be equated to the ordinary freedom of movement of the individual that constitutes one of the fundamental values of our democratic society. Rather, it is a licensed activity that is subject to regulation and control for the protection of life and property: see Dedman v. The Queen, 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2, at p. 35. The need for regulation and control of the use of vehicles on the highway is heightened both because of the high prevalence of the activity and its inherent dangers."

Many Alberta Judges have relied on the reasoning set out in R. v. Smith [1996] O.J. No. 372 (C.A.) as stated in paragraph 52:

"Driving is a heavily regulated activity. The police are engaged, not so much in after the fact investigations of completed crimes, but in preemptive investigations intended to avoid the serious harm caused by those who are involved in dangerous ongoing criminal conduct. The police's goal is to catch the drinking driver at the roadside and not at the scene of the accident. Drivers expect to be stopped and questioned by the police concerning matters relating to the operation of their vehicles. That expectation is part and parcel of the privilege of operating a motor vehicle. Drivers are required when detained at the roadside to provide the police with certain information (eg. licence and proof of insurance), which is directly relevant to their entitlement to drive on public thoroughfares."

Instructive of the tension existing between individual right and societal interests is found in R. v. Smith:

"The tension between individual rights and broader societal concerns is nowhere more apparent than in legislative attempts to deal with the carnage caused by those who commit offences involving drinking and driving. Protecting those who use the public roadways from the menace posed by drinking and driving is a pressing and substantial concern. Federal and provincial lawmakers have responded to that menace by equipping the police with special powers designed to deter drinking and driving and facilitate the timely apprehension of those who commit drinking and driving offences. Generally, these special provisions give the police extraordinary powers to stop motor vehicles and engage in investigative procedures at the roadside intended to assist the police in making a quick but informed determination of whether there are reasonable and probable grounds to believe that the driver is impaired or over the prescribed blood-alcohol level. These procedures inevitably involve some encroachment on individual rights, particularly the right to be free from arbitrary detention and the right to counsel upon detention. By and large the statutory provisions considered to date have been found to impose constitutionally justified limits on those rights. The question in each case must be whether the legislation in issue goes beyond the limits of s. 1 in seeking to protect community interests at the expense of individual rights?"

POLICE POWERS TO STOP

Under the Traffic Safety Act of Alberta

Under section 166 of the Traffic Safety Act, police can make traffic stops. Traffic Safety Act, Section 166, reads as follows below:

(1) For the purposes of administering and enforcing this Act or a bylaw, a peace officer may
(a) with respect to a vehicle,

i. signal or direct a driver of a vehicle to stop the vehicle, and

ii. request information from the driver of the vehicle and any passengers in the vehicle, and

(b) with respect to a pedestrian using or located on a highway, request information from that pedestrian.

(2) When signalled or directed to stop by a peace officer who is readily identifiable as a peace officer, a driver of a vehicle shall

(b) forthwith bring the vehicle to a stop,

(c) forthwith furnish to the peace officer any information respecting the driver or the vehicle that the peace officer requires, and

(d) remain stopped until permitted by the peace officer to leave.

(3) At the request of a peace officer who is readily identifiable as a peace officer, a passenger in a vehicle who is acting in a manner that is contrary to this Act or a bylaw shall forthwith furnish to the peace officer the passenger's name and address.

Two cases state the Supreme Court's stance on the police's ability to perform a traffic stop: R. v. Nolet, [2010] S.C.J. No. 24, and R. v. Orbanski; R. v. Elias. In R. v. Nolet. The court discusses, in paragraph 25, police stopping a vehicle under statutory authority:

'[P]ursuant to statutory authority, the police officers can randomly stop persons for "reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle"

Starting at paragraph 45 in the case of R. v. Orbanski, the court gives guidance for police stopping and determining impairment, even without provincial legislation:

"Screening of drivers necessarily requires a certain degree of interaction between police officers and motorists at the roadside. It is both impossible to predict all the aspects of such encounters and impractical to legislate exhaustive details as to how they must be conducted. The scope of justifiable police conduct will not always be defined by express wording found in a statute but, rather, according to the purpose of the police power in question and by the particular circumstances in which it is exercised. Hence, it is inevitable

that common law principles will need to be invoked to determine the scope of permissible police action under any statute. In this context, it becomes particularly important to keep in mind that any enforcement scheme must allow sufficient flexibility to be effective. The police power to check for sobriety, as any other power, is not without its limits; it is circumscribed, in the words of the majority of this Court in Dedman by that which is "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"

One must remember, if the first traffic stop is described under the TSA, it must have purpose explained in the act.

Madam Justice Moreau confirms, in the case of R. v. Arabi, 2007 ABQB 303, the powers given police under the TSA, do not authorize a stop unless there is a legitimate traffic purpose. In paragraph 19, Madam Justice Moreau states:

"The accused was the driver of a vehicle pulled over by the police through the activation of its emergency equipment. At that point, the accused was detained, as the police assumed control over the accused by a demand or direction: R. v. Mellenthin 1992 CanLII 50 (SCC), (1992), 76 C.C.C. (3d) 481, at p. 487. The lawfulness of his detention depends on the authority of the police to stop the vehicle. Constable Wadden acknowledged that the stop did not have anything to do with the enforcement of laws relating to the operation of motor vehicles and that he stopped the vehicle for purely investigative purposes. As noted in R. v. Simpson [1993] O.J. No. 308, 1993 CarswellOnt 83 (Ont.C.A.) at para. 31, once road safety concerns are removed as the basis for the stop, then police powers associated with those particular concerns cannot be relied upon to legitimize the stop."

Judge Fradsham in R. v. Reid remarks at paragraph 55 and 56:

"Where the stop and the detention are unrelated to the operation of the vehicle or other road safety matters, the fact that the target of the detention is in an automobile cannot enhance the police power to detain that individual.

The TSA's opening words of section 166, states the powers listed are to be used "[f]or the purposes of administering and enforcing this Act or a bylaw."

Under the Common Law

Several cases deal with an officer's gut instincts. R. v. Yeh, [2009] S.J. No. 582 (C.A.) at paragraph 75:

"It is, of course, well established that the police do not enjoy a general power to detain individuals for the purpose of ferreting out possible criminal activity. More particularly, they may not conduct an investigative detention to determine whether an individual is, in some broad way, "up to no good." In order to justify an investigative detention, the police suspicion must be particularized, i.e. it must relate to specific criminal wrongdoing."

Judge Fradsham in R. v. Reid, relies on the advice of Justice Sopinka in R. v. Kokesch, [1990] 3 S.C.R. 3:

"Where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally."

The paragraph above, balances against the jurisprudence in R. v. Grant. According to the proceedings from this case, police may question, without forming a detention, members of the public. As stated in paragraphs 37-41:

"Effective law enforcement is highly dependent on the cooperation of members of the public. The police must be able to act in a manner that fosters this cooperation, not discourage it. However, police investigative powers are not without limits. The notion of psychological detention recognizes the reality that police tactics, even in the absence of exercising actual physical restraint, may be coercive enough to effectively remove the individual's choice to walk away from the police. This creates the risk that the person may reasonably feel compelled to incriminate himself or herself. Where that is the case, the police are no longer entitled simply to expect cooperation from an individual. Unless, as stated earlier, the police inform the person that he or she is under no obligation to answer questions and is free to go, a detention may well crystallize and, when it does, the police must provide the subject with his or her s. 10(b) rights. That the obligation arises only on detention represents part of the balance between, on the one hand, the individual rights protected by ss. 9 and 10 and enjoyed by all members of society, and on the other, the collective interest of all members of society in the ability of the police to act on their behalf to investigate and prevent crime.

A more complex situation may arise in the context of neighbourhood policing where the police are not responding to any specific occurrence, but where the non coercive police role of assisting in meeting needs or maintaining basic order can subtly merge with the potentially coercive police role of investigating crime and arresting suspects so that they may be brought to justice. This is the situation that arises in this case.

As discussed earlier, general inquiries by a patrolling officer present no threat to freedom of choice. On the other hand, such inquiries can escalate into situations where the focus shifts from general community oriented concern to suspicion of a particular individual. Focussed suspicion, in and of itself, does not turn the encounter in a detention. What matters is how the police, based on that suspicion, interacted with the subject. The language of the Charter does not confine detention to situations where a person is in potential jeopardy of arrest. However, this is a factor that may help to determine whether, in a particular circumstance, a reasonable person would conclude he or she had no choice but to comply with a police officer's request. The police must be mindful that, depending on how they act and what they say, the point may be reached where a reasonable person, in the position of that individual, would conclude he or she is not free to choose to walk away or decline to answer questions."

RANDOM STOPS
Check stops for Impaired Enforcement

The landmark cases for checkstops are Dedman v. The Queen, [1985] 2 S.C.R. 2; R. v. Ladouceur, [1990] 1 S.C.R. 1257; and R. v. Orbanski; R. v. Elias.

All cases coped with keeping a balance between personal freedoms and police power. In Dedman v. The Queen, the court contended with justification, under common law, of a newly minted R.I.D.E. program not allowed by federal or provincial statue. For the common law basis of police power, the court relied on British jurisprudence in the case of R. v. Waterfield [1963] 3 All E.R. 659 (C.C.A.) with its articulated test.

The R. v. Waterfield test on page 661, is as follows:

"In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised 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. Thus, while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited."

In paragraphs 68 and 69, the Majority in Dedman v. The Queen apply the Waterfield test:

"In applying the Waterfield test to the random stop of a motor vehicle for the purpose contemplated by the R.I.D.E. program, it is convenient to refer to the right to circulate in a motor vehicle on the public highway as a "liberty". That is the way it was referred to in Hoffman v. Thomas, supra, and in Johnson v. Phillips, supra. In assessing the interference with this right by a random vehicle stop, one must bear in mind, however, that the right is not a fundamental liberty like the ordinary right of movement of the individual, but a licensed activity that is subject to regulation and control for the protection of life and property. Applying the Waterfield test, then, and using the word "liberty" in this qualified and special sense, it may be said that the random vehicle stop in this case was prima facie an unlawful interference with liberty since it was not authorized by statute. The first question, then, under the Waterfield test is whether the random stop fell within the general scope of the duties of a police officer under statute or common law. I do not think there can be any doubt that it fell within the general scope of the duties of a police officer to prevent crime and to protect life and property by the control of traffic. These are the very objects of

the R.I.D.E. program, which is a measure to improve the deterrence and detection of impaired driving, a notorious cause of injury and death.

Turning to the second branch of the Waterfield test, it must be said respectfully that neither Waterfield itself nor most of the cases which have applied it throw much light on the criteria for determining whether a particular interference with liberty is an unjustifiable use of a power associated with a police duty. There is a suggestion of the correct test, I think, in the use of the words "reasonably necessary" in Johnson v. Phillips, supra. 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. Because of the seriousness of the problem of impaired driving, there can be no doubt about the importance and necessity of a program to improve the deterrence of it. The right to circulate on the highway free from unreasonable interference is an important one, but it is, as I have said, a licensed activity subject to regulation and control in the interest of safety. The objectionable nature of a random stop is chiefly that it is made on a purely arbitrary basis, without any grounds for suspicion or belief that the particular driver has committed or is committing an offence. It is this aspect of the random stop that makes it capable of producing unpleasant psychological effects for the innocent driver. These effects, however, would tend to be minimized by the well publicized nature of the program, which is a necessary feature of its deterrent purpose. Moreover, the stop would be of relatively short duration and of slight inconvenience. Weighing these factors, I am of the opinion that having regard to the importance of the public purpose served, the random stop, as a police action necessary to the carrying out of that purpose, was not an unreasonable interference with the right to circulate on the public highway. It was not, therefore, an unjustifiable use of a power associated with the police duty, within the Waterfield test. I would accordingly hold that there was common law authority for the random vehicle stop for the purpose contemplated by the R.I.D.E. program."

In R. v. Ladouceur, the Supreme Court revisited the Waterfield test, providing additional guidance. In R. v. Ladouceur, the Court held that:

"While the routine check is an arbitrary detention in violation of s. 9 of the Charter, the infringement is one that is reasonable and demonstrably justified in a free and democratic society. As a result, s. 189a(1) [as it then was, now s. 216(1)] of the Highway Traffic Act [of Ontario] is a valid and constitutional legislative enactment."

In R. v. Orbanski; R. v. Elias, the previous cases were again summed up in paragraphs 40 and 41:

"The legality and constitutionality of random vehicle stops pursuant to general statutory vehicle stop powers was confirmed in Ladouceur, in which a general provision in the Ontario Highway Traffic Act, R.S.O. 1980, c. 198, virtually identical to s. 76.1(1) of the Manitoba Act was reviewed for Charter compliance.

It is also settled law that the police have the authority to check the sobriety of drivers. This

authority was found to exist at common law in Dedman. More pertinently, it was also found in statute in Ladouceur, where this Court held that checking the sobriety of drivers was one of the purposes underlying the general statutory vehicle stop powers. It is the same kind of general statutory power that is in question on these appeals. As the Court stated in Ladouceur, police officers can stop persons under such statutory power only for legal reasons — in the circumstances of that case (as here), for reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle (p. 1287)."

VEHICLE STOPS TO INVESTIGATE OTHER OFFENCES – SECTION 9
Reasonable Grounds to Detain

The ability of police powers to detain and search an individual for investigation, were examined by the Supreme Court in R. v. Mann. The Majority in a 7-2 decision held at paragraph 34 and 35:

"The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the Waterfield test.

Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have carte blanche to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a de facto arrest."

The Court goes on to articulate a test in paragraph 45:

"[P]olice 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. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. In this connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest, which do not arise in this case."

R. v. Houben [2006] S.J. No. 715 (C.A.), paragraphs 67 and 68, state:

"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) [of the Highway Traffic Act of Saskatchewan] 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 related to "reasonable grounds to detain."

A traffic stop or sobriety check, used on the pretext to investigate other offences, is considered an arbitrary detention. All detention requires reasonable grounds.

R. v. Simpson, (1993)12 OR (3d) 182 at paragraph 66, held articulable cause by the Ontario Court of Appeal:

"I should not be taken as holding that the presence of an articulable cause renders any detention for investigative purposes a justifiable exercise of a police officer's common law powers. The inquiry into the existence of an articulable cause is only the first step in the determination of whether the detention was justified in the totality of the circumstances and consequently a lawful exercise of the officer's common law powers as described in Waterfield, supra, and approved in Dedman, supra. Without articulable cause, no detention to investigate the detainee for possible criminal activity could be viewed as a proper exercise of the common law power. If articulable cause exists, the detention may or may not be justified. For example, a reasonably based suspicion that a person committed some property-related offence at a distant point in the past, while an articulable cause, would not, standing alone, justify the detention of that person on a public street to question him or her about that offence. On the other hand, a reasonable suspicion that a person had just committed a violent crime and was in flight from the scene of that crime could well justify some detention of that individual in an effort to quickly confirm or refute the suspicion. Similarly, the existence of an articulable cause that justified a brief detention, perhaps to ask the person detained for identification, would not necessarily justify a more intrusive detention complete with physical restraint and a more extensive interrogation."

Starting at paragraph 14 in R. v. Bell, 2004 ABPC 136, Judge Brown provides a summary of "articulable cause" or "reasonable grounds to detain":

"The doctrine of articulable cause, referred to in passing in Wilson, was further developed, along with the related doctrine of investigative detention, by the Ontario Court of Appeal in Simpson and, most recently and definitively, by the Supreme Court of Canada, in Mann.

Some of the principles established by these cases are:

a. Police duties and powers are not entirely coincident, that is, police are not entitled to engage all police powers in every instance of performing their duties. (Simpson, at 493; Mann, para. 35)

b. Reasonable grounds for detention will be based on an objective assessment of all the surrounding circumstances. (Simpson, at 501; Mann, para. 34)

c. A lawful detention will be one for which there is a clear connection between the person detained and a recent or ongoing criminal offence. (Simpson, at 501; Mann, para. 45)

d. A person's presence in a high crime area on its own does not amount to reasonable grounds for detention, although it may help to establish proximity to a particular crime. (Simpson, at 504; Mann, para. 47) and

e. A police officer's hunch does not amount to reasonable grounds for detention. (Simpson, at 501 - 502; Mann, para. 35)

STOPS TO INVESTIGATE DRINKING AND DRIVING OFFENCES – SECTION 9

Generally

In R. v. Smith, the Ontario Court of Appeal discusses the tension between the police's investigation ability of impaired driving cases, and personal liberty:

"Driving is a heavily regulated activity. The police are engaged, not so much in after the fact investigations of completed crimes, but in preemptive investigations intended to avoid the serious harm caused by those who are involved in dangerous ongoing criminal conduct. The police's goal is to catch the drinking driver at the roadside and not at the scene of the accident. Drivers expect to be stopped and questioned by the police concerning matters relating to the operation of their vehicles. That expectation is part and parcel of the privilege of operating a motor vehicle."

Grounds for Stop – Citizen Complaints or Tips

Justice Johnstone discusses the lower court's findings, in R. v. Sheck, 1999 ABQB 891, their ability in aiding impaired investigations:

"Given the evidence of the complaint about a vehicle travelling to the same destination as the accused eventually drove his vehicle, a vehicle which matched the description of the complaint, absent the license plate number and bearing in mind that the complaint was about a possible impaired driver, it does seem to me that viewed objectively the officer did have reasonable and probable grounds to believe that the accused's ability to operate a motor vehicle was impaired by alcohol.

Absent that complaint, I would have found otherwise. I would have found that the observations that [the officer] made on his own were not sufficient. However, information had been relayed to him and that, in my view, combined with what he observed gave him reasonable and probable grounds to reach the opinion that he did reach."

Justice Johnstone ruled the Trial Judge's reasons were sound and logical. He also declared no reversible error as the police officer had reasonable and probable grounds for stopping and making a demand for a breathalyser.

Reasonable grounds for the stop, from an anonymous time and officer's observations, was granted by the court, in Slinger v. R., [2006] NLTD 14.

Grounds for Stop – Driving in Vicinity of Bar

Grounds for a traffic stop after a vehicle is seen leaving a bar, are granted in several Alberta cases. Even though it was not argued, the judge in the case R. v. Rickett, 2012 ABPC 152, did not find any arbitrary detention.

In R. v. Smith, [2007] A.J. No. 606 (Prov. Ct), Judge M.G. Allen states:
"In the case at bar, the officer did not see where the driver came from nor make any observations of the driver before entering the car. This might have been useful in determining the possible sobriety of the driver. Nothing in the driving itself was unusual. However, the officer stated he believed that because the applicant was coming from a parking lot where the only business open was a bar that he formed a suspicion that the driver may have been drinking."

Grounds for Stop – Seen Leaving a Bar

Findings for a case similar to the above Smith case, comes from the case of R. v. Nyal, [2005] A.J. No 628 (Prov. Ct):

"I am satisfied in this case that the constable was authorized by statute to stop the defendant's vehicle, one he had seen shortly before driving away from a drinking establishment in the manner he described. That was sufficient cause whether or not a purely random stop was permitted in any event."

DETENTION OF STOPPED VEHICLES
Driver Stops Vehicle after Seeing Police

Judge Ferguson in R. v. Russell, [2007] NBPC 17, rules, after hearing the accused, stopped his vehicle in the middle of the road, then exited the vehicle for no obvious reason:

"In order to be arbitrarily detained by police through the stopping of a motor vehicle, the driver must in some way have been directed to stop or have reasonably deduced, in all of the circumstances either apparent to him or objectively discernible, that the police wished

him to stop. There is no evidence that could lend an air of reality to the submission that the officer played a role in the decision of the driver to stop the vehicle that night at the time he did. The stop was not arbitrary. It was the voluntary act of Mr. Russell. As a result, Section 9 of the Charter was not engaged when the vehicle stopped."

Police Approach Stopped Vehicles

The Trial Judge dealing with an unreasonable search on a darkened vehicle which was behind a closed service station, was confirmed by Supreme Court ruling in R. v. Chaisson, [2006] S.C.J. No. 11.

A police officer, with suspicions aroused by the appellant and a passenger, sitting in a darkened car behind a closed service station, discovered Marijuana. According to the officer, occupants of the car, reacted with shock when noticing his presence. In paragraph 4, the Supreme Court states:
"On the facts as he found them, the trial judge concluded that the appellant's rights under ss. 8, 9 and 10(b) of the Canadian Charter of Rights and Freedoms had been violated. The appellant's detention was arbitrary and, "but for the detention the marijuana [found by the police officer] on the floor [of the appellant's automobile] would not have been discovered and but for the marijuana on the floor being discovered, there would have been no right to arrest these men". And but for the discovery of the marijuana on the floor, the trial judge reiterated, there would have been no reasonable basis for a search of the vehicle and for the resulting arrest of its occupants. Bearing in mind the cumulative impact of these violations on the appellant's constitutional rights, the trial judge excluded, under s. 24(2) of the Charter, the marijuana found in his car and entered an acquittal."

POST-BREATHALYSER DETENTION – SECTION 9

Post-breathalyser detention often occurs in rural areas where RCMP prefer to hold an accused impaired driver until a sober adult picks them up. The breath demand leads to extended jail stays after breath samples are provided. Police hold the accused "to sleep it off" after the breathalyser test.

In the Alberta Court of Appeal, In R. v. Simms, 2009 ABCA 260, the post-breathalyser detention was studied, after the accused was held for 9 hours, post-breathalyser.

"In this case, even if there was a Charter breach, to give a stay of proceedings for an academic breach like this would be grossly disproportionate. And no other remedy would do the accused any good. His penalty was only a fine (and driving prohibition), not jail. The police got no evidence during or as a result of detention, so s. 24(2) does not apply."

This issue is also dealt with in R. v. Johnstone, 2009 SKPC 133. The accused was held for just under six hours after his last breath sample because of the officer's belief the accused lived too far from the police station. Starting at paragraph 13, the court gives the following analysis:
"The Court agrees that ss. 497 and 498 of the Criminal Code mandate the requirements that

must be followed by an arresting officer (s. 497) and an officer in charge of detention (s. 498). The "Exception" in each section reads the same whereby continued detention would be warranted. Section 497 states in this regard:

Exception

(1.1) A peace officer shall not release a person under subsection (1) if the peace officer believes, on reasonable grounds,

(a) that it is necessary in the public interest that the person be detained in custody or that the matter of their release from custody be dealt with under another provision of this Part, having regard to all the circumstances including the need to

(i) establish the identity of the person,

(ii) secure or preserve evidence of correlating to the offence,

(iii) prevent the continuation or repetition of the offence or the commission of another offence, or

(iv) ensure the safety and security of any victim of or witness to the offence; or

(b) that if the person is released from custody, the person will fail to attend court in order to be dealt with according to law. [Emphasis added] The determination for continued detention however does not rest solely upon the four criteria set out under "Exception" in ss. 497 and 498. What also must be determined is whether the officer believes on reasonable grounds that it is necessary in the public interest having regard to all circumstances including the four criteria as set out. This would encompass for example the state of sobriety of the prisoner. It certainly would not be in the public interest to turn someone out in an intoxicated condition where personal harm may well result to the individual or the public be put at risk by his or her conduct. It of course may encompass other considerations such as time of day, when the accused could be reasonably released and whether anyone was present to drive the accused."

The Trial Judge Confirms the Crown needs to prove detention is warranted due to the best interest of the accused or the public's best interest, in R. v. McKelvey, (2008) ABQB 466. The 10 hours of post-breathalyser detention is arbitrary since the Crown did not prove this. The remedy of exclusion of the breath sample, which could not be linked to the breach, was substituted by the Appeals Judge for a judicial stay in considering R. v. Simpson [1995] 1 S.C.R. 449, R. v. Pringle (2003) ABPC 7, and R. v. Korecki, 2007 ABPC 321.

A stay was granted for a post-breathalyser detention after the accused was detained for 12 hours and 13 minutes, in R. v. Fox, [2007] SKPC 61. In paragraphs 20 and 21, Judge O'Hanlon states:
"I am satisfied the accused's detention was not necessary to establish his identity, nor was his detention necessary to secure or preserve evidence of the offence, nor was it necessary

to ensure the safety or security of any victim or witness; and his detention was not necessary to ensure he would attend court. The only other consideration, therefore, is whether his detention was necessary to prevent Mr. Fox from continuing or repeating this offence or from committing another offence. On this point, there are a number of considerations. Firstly, Mr. Fox's vehicle was not available to him as it had been impounded by the RCMP. The investigating officer's assertion that it was possible Mr. Fox could have gotten another vehicle is mere speculation and does not amount to reasonable grounds for the belief that he could have continued the offence. Secondly, the officer did not inquire of Mr. Fox about people he could be released to. This inquiry would have given the officer numerous options for the accused's release. Given the accused's ability to provide the officer with detailed information throughout the course of her investigation, and given that Mr. Fox was able to take care of himself in spite of his apparent level of intoxication, it is reasonable to assume that he could also have provided her with the information necessary to contact one or more of his relatives in an effort to find a suitable place to take him or a suitable person to pick him up. And finally, the officer's comments regarding the general practice of lodging individuals in cells when they are brought in for impaired driving offences is of great concern. This practice effectively ignores the legal obligation to release an individual unless reasonable grounds exist for his detention.

On this final consideration, I find that the investigating officer did not have a reasonable belief that Mr. Fox's continued detention was necessary to prevent him from continuing or repeating this offence, or from committing another offence. As a result, I find that Mr. Fox was detained in contravention of the Criminal Code provisions and was, therefore, arbitrarily detained in contravention of Section 9 of The Charter."

In R. v. Korecki, 2007 ABPC 321, another post-breathanalyser detention lasted about 9 hours with the accused handcuffed in the cell for 2 of the 9 hours; irritating Judge Ogle even further. In combination with the 10(b) breach, this gave Judge Ogle reason for a judicial stay of proceedings. The test set out in R. v. Weaver, 2005 ABCA 105, was the basis for this decision.

In R. v. Timmins, (July 25, 2003, Alta. Prov. Ct. Per Rae, P.C.J.), the accused was charged with impaired driving and over .08. A stay of proceedings was granted because of the arbitrary detention of the accused post-breathalyser. The accused was detained for some 5 hours after he was placed in cells. There was no sign the accused was aggressive after being placed in cells, nor was there any evidence the accused was anything other than moderately impaired. The reasoning in R. v. Pringle (2003) ABPC 7 followed.

That same year, R. v. Meier, (December 23, 2003, Alta. Prov. Ct. Per Norheim, P.C.J.), the accused was held for 5.5 hours post-breathalyser. The ability for other people to pick up the accused was not canvassed, nor the possibility of taking a cab home. Application for a stay not granted. The Judge followed R. v. Cutforth, (1998), 40 C.C.C. (3d) 253 (Alta. C.A.) and distinguished R. v. Pringle.

SECTION 12
Excessive Force

In R. v. Girbav, 2012 ABPC 219 (CanLII), police forcibly removed the accused from a vehicle, slamming him face down on the road, where he was beaten with fists, feet, and a police baton. Argued the excessiveness of the police was a breach of section 12, however Judge Brown directed a stay after characterizing the police behavior as s.7 and 10(b) breaches.

CONCLUSION

Personal liberty versus the societal interest of public safety is a balancing act being fought in the courts. The greater emphasis is on public safety with the current legislative intent. However, a strong tool remains with the practitioner during an impaired driving case, in the successful s.9 argument.

Section 12 may strengthen with new impaired driving provincial legislation. If extra sanctions are set against an accused, the defence, so the new legislation passes scrutiny, should raise the section 12 argument. Because the legislation is new, further exploration by the courts and counsel may be warranted.