

Remarks of Prince Edward Island Police Commissioner Hon. Gerard Mitchell delivered on May 28, 2013 at the 2013 CACOLE conference held in Charlottetown.

One of the biggest problems with police is their too frequent failure to observe the code of conduct provision requiring them to respect the rights of others. Sometimes the violations are the result of ignorance, sometimes carelessness, and sometimes complete disregard or utter contempt. More must be done to curtail these violations because they bring disrepute upon the administration of justice and a loss of public trust and confidence.

There was a time, not so long ago, when reliable relevant evidence was admissible in our criminal courts without much regard to how police obtained it. Nowadays the level of scrutiny is much higher.

Change came because of concern that rights were being trampled on without consequences and that sometimes evidence and convictions were being obtained at too high a cost to the integrity of the criminal justice system. It was therefore decided that government and its agents including police should be more constrained.

A new sheriff, the Canadian Charter of Rights and Freedoms, came to town in 1982. It did not invent rights but it did give them a status and force they previously lacked. It changed our form of government to one in which individual rights are paramount. These rights impose significant limits and new duties on police. As a result police are now held to account for the way they conduct investigations, gather evidence and treat suspects as never before. To comply with Charter standards police need to be better educated, more disciplined and, more professional than ever.

Any question as to whether the Charter would make any difference was soon answered by the Supreme Court of Canada. In its first charter violation decision in 1985 the Supreme Court ruled that a Breathalyzer demand constituted a detention under s.10 of the Charter thereby triggering rights to counsel for the detainee and imposing informational duties on the police. That was important because in 1979 the Supreme Court had ruled that a breath demand did not constitute a detention under a similarly worded section of the 1960 Canadian Bill of Rights. By reversing itself the Supreme Court was making clear that rights were going to be more robust under the Charter than had previously been the case.

The Charter backs up the rights it guarantees with a powerful enforcement mechanism that

enables courts to grant such remedies as they consider just and appropriate for violations. Using these broad powers courts in various cases have stayed proceedings, excluded evidence, reduced sentences and awarded damages.

In addition to the broad general power just mentioned, the Charter specifically directs courts to exclude illegally obtained evidence if in all the circumstances its admission could in the long run bring the administration of justice into disrepute. Exclusion is not automatic. In making the determination whether or not to exclude illegally obtained evidence courts must weigh and balance the seriousness of the police misconduct, the impact of the violation on the accused's rights, and society's interest in having the case decided on its merits.

The purpose of excluding illegally obtained evidence is not to punish police but to protect the reputation of the administration of justice. The police misconduct, as such, is left to be punished under the applicable police legislation and sometimes the Criminal Code. [Not every charter breach results in exclusion of the evidence obtained but there is still a code of conduct issue to be dealt with under the police legislation.]

Exclusion of illegally obtained evidence takes a toll on the truth finding function of a trial and often destroys the Crown's case. Nevertheless, if after considering all the relevant factors, the court concludes admission of the evidence would bring the administration of justice into disrepute it must be excluded.

In one of its more recent decisions involving police misconduct the Supreme Court of Canada upheld the acquittal of a woman charged with the murder of her husband. She was acquitted, not on the merits, but because the trial judge threw out all the evidence the police had gathered against her. He did so after finding the police had violated every Charter right accorded a suspect in a criminal investigation.

Mr Justice Cromwell writing for the majority of the Supreme Court said the trial judge was right to conclude that courts must not tolerate this sort of behavior by those sworn to uphold the law.

The message the Supreme Court of Canada was sending by this decision is that if police do not respect the Charter, courts will throw out their evidence and the loss will fall squarely on their shoulders.

Ironically, the police in that case could have gotten the evidence legally. They had grounds to obtain a warrant if only they had bothered to do so.

In Prince Edward Island in the last couple of years we have had a serious home invasion case dismissed because of non-compliance with Charter standards during the investigation and in another case a police officer was convicted of assault and unlawful confinement as a result of his detaining someone in the back of a police car without lawful authority.

Although some are more so than others, every Charter violation is serious. After all, the Charter is the supreme law of the land. Nevertheless, Charter violations by police remain all too common. It seems every other week the media carries some new video recording of police exceeding their authority and abusing the rights of suspects. The law reports are full of Charter violation cases. These violations take a wide array of forms including: assaults, planting evidence, unjustified and humiliating strip searches and other unreasonable invasions of privacy, unlawful detentions, and misleading judicial officers to obtain warrants. Over the past 31 years cases involving Charter violations by police have occupied far more of the Supreme Court of Canada docket than any other subject.

If police think they can violate the rights of suspects and still maintain public trust and confidence they are wrong. The Charter is not just the refuge of the criminal element. It is very popular among the public at large. According to one survey it has an 84% favorable rating which is much higher than that of any other individual, group, or institution in the country. Accordingly, violating Charter rights is not the way to win public support or respect for law enforcement. People want their rights protected and they know theirs are not safe if those of others are violated without consequences. That is one of the reasons the public supports civilian oversight of police.

Sometimes, the negative impact of Charter violations on the reputations of the administration of justice may be lessened if the police acted in good faith. There have been many cases where illegally obtained evidence was saved from exclusion for that reason. However, good faith cannot be claimed if a Charter violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority.

The Supreme Court of Canada has said police "are rightly expected to know the law" (**Grant** 2009 para 133) and it has also said: police cannot be said to act in good faith if they have not acted diligently to make themselves aware of law circumscribing their powers. It is therefore imperative that police be kept up to date on developments in the law that pertain to their powers.

For example, under the Charter police are not allowed to arbitrarily detain or subject anyone to

an unreasonable search. As some judges have said, Police do not enjoy a general power to detain in order to ferret out possible criminal activity or to determine if a person is up to no good. Police need to know what constitutes detention, the limits on their powers of detention, the limits of their powers of search upon detention, as well as their informational duties to a detainee. They need to realize a detention can be psychological as well as physical and that detentions are arbitrary unless authorized by statute or common law. Police cannot detain a person on the basis of a hunch. Furthermore the fact that the hunch turns out to be correct does not cure the violation. They have to know that a pat down search for officer safety purposes is not the same as a search for evidence and that one may be justified when the other is not.

The decisions of the courts, especially those of the Supreme Court of Canada, perform an important educative function. As a recent Globe and Mail editorial noted; courts over the past 3 decades have been engaged in fashioning and honing criteria that protect Charter rights without unduly hobbling police. It is therefore important that police officers be made aware in a timely manner of court decisions that relate to their powers and duties.

In this province the Attorney General has recently issued a police training directive that provides for some additional training in regards to Charter developments and compliance. This will help in keeping municipal police officers informed about recent changes in the law and giving them a better understanding of Charter standards. However, more has to be done.

Charter compliance must come more to the forefront of police training and continuing education. The amount and quality of code of conduct and charter compliance training a candidate has had should be a significant factor in hiring and promotion decisions. In my opinion code of conduct and Charter compliance are at least as important as firearms, pursuit driving and defensive tactics training.

Police leadership including middle management and unit commanders must have zero tolerance for Charter non-compliance by those who serve under them even when no complaint is made. Every officer must be made to understand that no cause is sufficiently worthy to justify a departure from Charter standards. It must also be made clear that a Charter breach is a violation of the Police Profession's Code of conduct for which there will be consequences. Although some violations may not warrant a penalty they all require correction. [perhaps by some retraining].

Rank and file police officers must have greater commitment to their oath of office and code of professional conduct. The first three provisions of the Police Professional Code of conduct requires them to respect the rights of others, to maintain the integrity of the administration of justice, and to perform their duties in accordance with the law and without abusing their

authority. Failure to observe these rules of conduct should be the subject of disciplinary or corrective measures even when no public complaint is lodged.

Police departments should strive to create some in-house training and expertise in the area of ethics and charter compliance. To help with that I would recommend a couple of excellent, inexpensive and readily accessible resources for keeping police abreast of legal issues and developments relating to their work.

The first resource I would suggest is the book, **Salhany's Police Manual of Arrest, Seizure and Interrogation** by CACOLE president Ian Scott and Joseph Martino who build on the earlier work of retired Justice Roger Salhany. The 2nd resource is a blog called **Legal Topics For Canadian Police**. It is written and maintained by Henry Waldock an experienced B. C. Crown counsel and police college lecturer. The web address is www.henrywaldock.ca. Mr Waldock analyzes current caselaw from a policing perspective. All police departments should be tuning into this on a regular basis to keep themselves up to date.

I know that police training is expensive but the lack of it can be even more so. In deciding about funding for training, governments; federal, provincial and municipal should take notice of the SCC decision in **Ward v. City of Vancouver** which served notice that governments may be held liable for damages in civil actions initiated by persons who are victims of Charter violations by police. One of the considerations in such a case might be the level of sensitivity government has shown for Charter concerns as evidenced by the training they provided for police officers.